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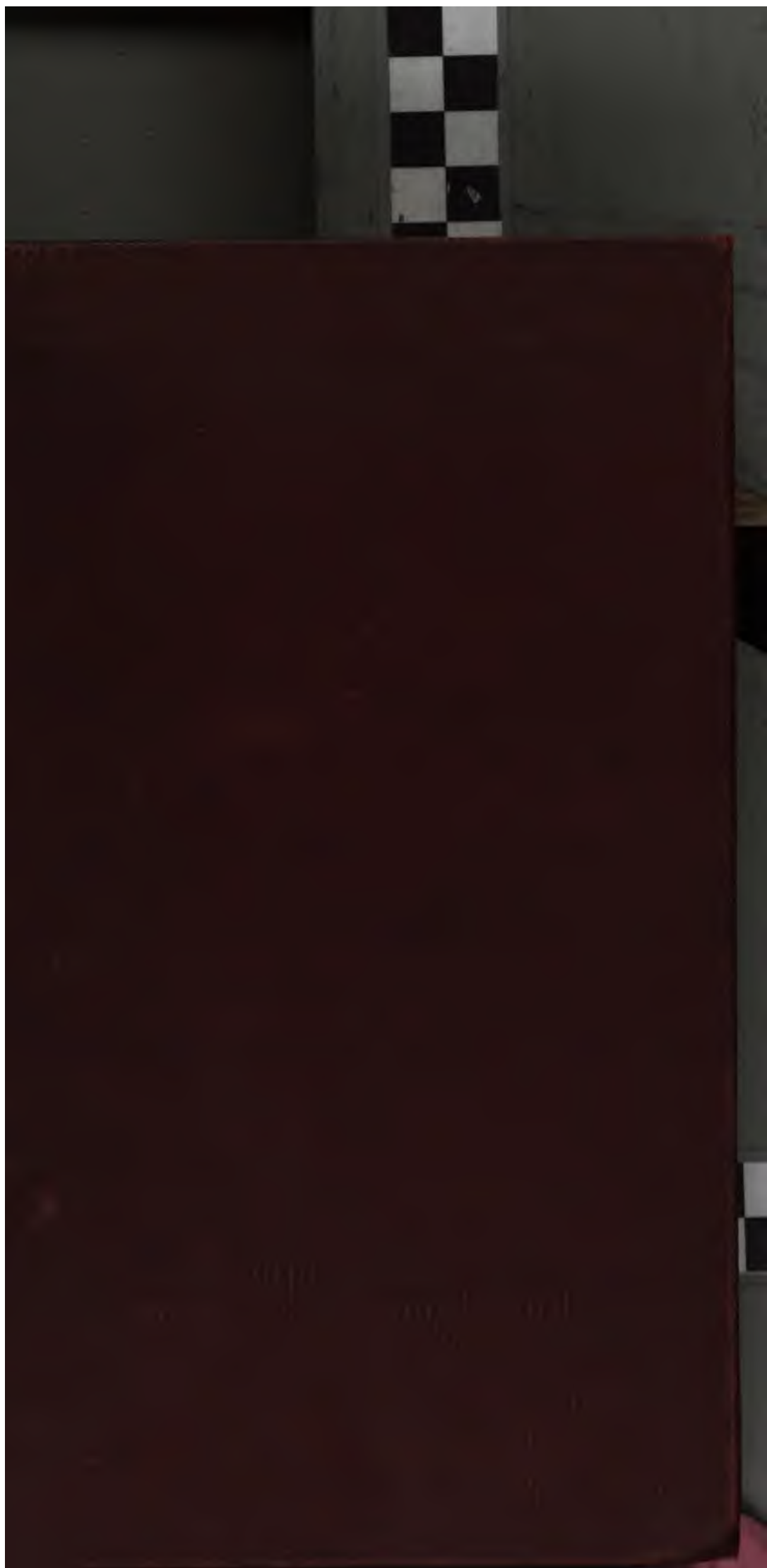
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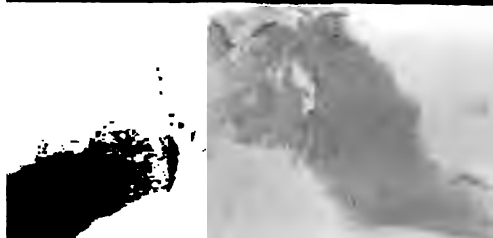
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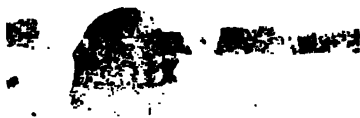


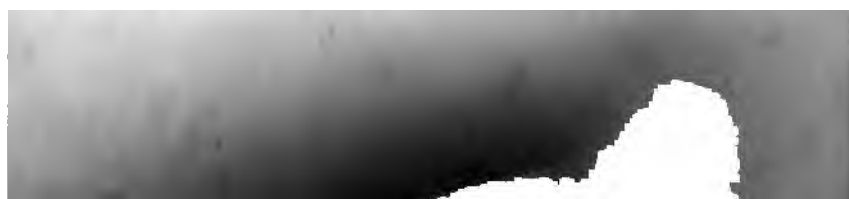


Edw. J. Lowell

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CONSTITUTIONAL LAW.

BEING

A COLLECTION OF POINTS

ARISING UPON

THE

CONSTITUTION

AND

JURISPRUDENCE

OF THE

UNITED STATES

WHICH HAVE BEEN SETTLED

BY

JUDICIAL DECISION AND PRACTICE.

By THOMAS SERGEANT, Esquire.

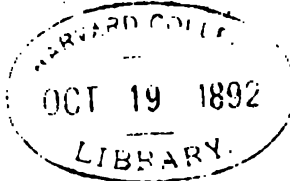
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Cambridge

Eastern District of Pennsylvania, to wit:

BE IT REMEMBERED, that on the thirteenth day of November, in the forty-seventh year of the independence of the United States of America, A. D. 1822,

[SEAL.] Thomas Sergeant, of the said District, hath deposited in this office the Title of a book, the right whereof he claims as Author, in the words following, to wit,

Constitutional Law. Being a Collection of points arising upon the Constitution and Jurisprudence of the United States, which have been settled by Judicial Decision and Practice. By Thomas Sergeant, Esquire.

In Conformity to the Act of the Congress of the United States, intituled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned."—And also to the Act, entitled, "An Act supplementary to An Act, entitled, "An Act for the Encouragement of Learning, by securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of such Copies during the Times therein mentioned," and extending the Benefits thereof to the Arts of designing, engraving, and etching historical and other Prints."

D. CALDWELL,
Clerk of the Eastern District of Pennsylvania.



PREFACE.

THE author of the following treatise believes its object and plan to be novel. He has met with no work, whence he could derive assistance. He does not doubt, that many imperfections may be found in it, which he has himself been unable to detect or remedy. The learned and candid reader will appreciate the difficulties attending the undertaking, and make every reasonable allowance.

Every American lawyer must feel the utility of reducing to system, the principles and practice of our National Jurisprudence, of tracing them up to their constitutional source, and of exhibiting, in a succinct manner, the general origin, and uniform harmony, of the whole. If the writer has succeeded in laying the foundation for a work of this kind, he will be satisfied; leaving to more competent hands, the completion of a task, which must greatly aid in the diffusion of knowledge, on subjects of the highest importance, and most extensive application.

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THE
COURTS OF THE UNITED STATES,
&c. &c.

CHAPTER I.

SUPREME COURT—ORGANIZATION.

THE Constitution provides in the 1st article, (sect. 8, 9.) that Congress shall have power to constitute tribunals inferior to *The Supreme Court*: and directs in the 3d article, (sect. 1, 1.) That the judicial power of the United States shall be vested in *one Supreme Court*, and in such inferior Courts as Congress may, from time to time, ordain and establish. The organization of this Court, in relation to the number of its Judges, the places and periods of its session, &c. are provided for by the act of Congress, of September 24th, 1789, commonly called the Judicial Act, and other acts subsequently passed.

By the 1st sect. of the act of September 24th, 1789, the Supreme Court shall consist of a Chief Justice and five Associate Justices, any four of whom shall be a quorum, and shall hold, annually, at the seat of government, two sessions; the one commencing the first Monday of February, and the other the first Monday of August. And the Associate Justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

But by the act of April 29, 1802, sect. 1. the Supreme Court shall be holden by the Justices thereof, or any four of them, at the city of Washington, and shall have one session in each and every year, to commence on the first Monday of February, annually; and if four of the said Justices shall not attend within ten days after the time hereby appointed for the commencement of the said session, the business of the said Court shall be continued over till the next stated session thereof; *provided always*, that any one or more of the said Justices, attending as aforesaid, shall have power to make all necessary orders touching any suit, action, writ of error, process, pleadings, or proceedings returned to the said Court or depending therein, preparatory to the hearing trial, or decision of such action, suit, appeal, writ of error, process, pleadings, or proceedings.

The 2d section enacts, that it shall be the duty of the Associate Justice resident in the fourth circuit formed by this act, (Maryland and Delaware) to attend at the city of Washington, on the first Monday of August next, and on the first Monday of August, each and every year thereafter, who shall have power to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings, or proceedings; and that all writs and process may be returnable to the said Court, on the said first Monday in August, in the same manner as to the session of the said Court, herein before directed to be holden on the first Monday in February; and may also bear teste on the said first Monday in August, as though a session of the said Court was holden on that day. And it shall be the duty of the clerk of the Supreme Court to attend the said Justice on the said first Monday in August in each and every year, who shall make due entry of all such matters and things as shall or may be ordered as aforesaid by the said Justice. And at each

and every such August session, all actions, pleas, and other proceedings relative to any cause, civil or criminal, shall be continued over to the ensuing February session.

By the act of February 24th, 1807, sect. 5. the Supreme Court of the United States shall hereafter consist of a Chief Justice and six associates; any law to the contrary notwithstanding. And for this purpose, there shall be appointed a sixth Associate Justice, to reside in the seventh circuit, (Kentucky, Tennessee, and Ohio,) whose duty it shall be, until he is otherwise allotted, to attend the Circuit Courts of the said seventh circuit, and the Supreme Court of the United States, and who shall take the same oath, and be entitled to the same salary as are required of, and provided for, the other Associate Justices of the United States.

The 6th section of the act of September 24th, 1789, provides that the Supreme Court may, by any one or more of its Justices being present, be adjourned from day to day, until a quorum be convened: and though one of the Justices should be dead, it seems four would constitute a quorum.^(a)

By sect. 8, their oath or affirmation is prescribed: and by sect. 7. the Court is authorized to appoint a clerk, who is to take an oath or affirmation, and to give bond with sureties.

The act of May 8, 1792, sect. 12. provides that all the records and proceedings of the Court of Appeals heretofore appointed, previous to the adoption of the present Constitution, shall be deposited in the office of the clerk of the Supreme Court of the United States, who is thereby authorized and directed to give copies of all such records and proceedings to any person requiring and paying for the same, in like manner as copies of the records and other proceedings of the said Court,

(a) Pollard v. Dwight. 4 Cranch, 421.

are by law directed to be given ; which copies shall have like faith and credit as all other proceedings of the said Court.

By the 7th sect. of the act of February 25th, 1799, wherever, in the opinion of the Chief Justice, or in case of his death, or inability, of the senior Associate Justice of the Supreme Court of the United States, a contagious sickness shall render it hazardous to hold the next stated session of the said Court at the seat of government, it shall be lawful for the Chief, or such Associate Justice, to issue his order to the marshal of the district within which the Supreme Court is by law to be holden, directing him to adjourn the said session of the said Court to such other place within the same or an adjoining district, as he may deem convenient, and the said marshal shall thereupon adjourn the said Court, by making publication thereof in one or more public papers, printed at the place by law appointed for holding the same, from the time he shall receive such order until the time by law prescribed for commencing the said session. And the District Judges shall respectively, under the same circumstances, have the same power, by the same means, to direct adjournments of the District and Circuit Courts, within their several districts, to some convenient place within the same respectively.

CHAPTER II.

SUPREME COURT—ORIGINAL JURISDICTION.

THE constitution expressly defines and fixes the original jurisdiction of the Supreme Court, by declaring the cases in which it shall take original jurisdiction; and that in others it shall take appellate jurisdiction. *(a)* Congress may, by legislative enactment, enforce the provisions of the constitution on this head; but it cannot assign to the Supreme Court original jurisdiction in any case in which it is not vested in that Court by the Constitution. *(b)*

The provisions of the constitution that relate to the original jurisdiction of the Supreme Court, and the judicial power of the United States, are the following.

Art. III. Sec. 1, 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as congress may, from time to time, ordain and establish.

Sec. 2, 1. The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states—between a state and citizens of another state—between citizens of different states—between citizens of the same state, claiming lands under grants

(a) Marbury v. Madison. 1 Cranch, 137. 175.

(b) *Ib.*

of different states—and between a state or the citizens thereof and foreign states, citizens, or subjects.

Sec. 2, 2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as Congress shall make.

Amendments.—Art. 7. In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Amendments.—Art. 11. The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

By the act of September 24th, 1789, sect. 13. the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens; and except also, between a state and citizens of other states or aliens, in which latter case it shall have original, but not exclusive jurisdiction. And shall have, exclusively, all such jurisdiction of suits or proceedings *against* ambassadors or other public ministers, or their domestics or domestic servants as a court of law can have or exercise consistently with the law of nations. And original, but not exclusive jurisdiction of all suits brought *by* ambassadors or other public ministers, or in which a consul or vice consul shall be a party. And the trial of

issues in fact, in the Supreme Court, in all actions at law, against citizens of the United States, shall be by jury.

Soon after the adoption of the Constitution, several suits against states were brought in the Supreme Court, by citizens of other states. The states, however, refused to appear to these suits; and it was insisted that the clause in the Constitution, extending the judicial power of the United States, to controversies between a state and citizens of another state, embraced only suits brought *by* a state, and did not include suits brought against a state. But in the case of *Chisholm v. Georgia*,^(c) it was decided by the Supreme Court that assumpsit might be maintained against a state by a citizen of a different state. This decision occasioned the 11th amendment to the Constitution above mentioned, which was construed not only to prohibit the bringing of suits against a state by citizens of another state or aliens, from the time of its adoption, but to put an end to all suits of that description which were then pending.^(d) This amendment, however, does not affect controversies between two or more states,^(e) or between a state and foreign states, or suits brought by a state against citizens of a different state. But it seems, a state cannot go into a court of the United States, to enforce its own penal laws in any case.^(f)

But to deprive the Circuit Court of jurisdiction on the ground that states are parties, such states must be either nominally or substantially parties. It is not sufficient in an ejectment brought by one individual against

^(c) 2 Dall. 419.

^(d) *Hollingsworth v. Virginia*. 3 Dall. 378. See 2 Dall. 480. note.

^(e) See for example, *New York v. Connecticut*. 4 Dall. 5.

^(f) *Cohens v. Virginia*. 6 Wheat. 399.

another in which no state is before the Court, that the suit may in its result consequentially affect a state or states. As for instance, that grants made by such states are in litigation, and that in the event of the verdict, retribution must be made by either of them, or that the issue is, in which of two states the land in dispute lies: for the decision between individuals cannot affect the rights of a state.(g)

A state may proceed originally in the Supreme Court for the purpose of contesting a right of soil.(h) Upon the question, whether there was any mode by which a state might have the right of jurisdiction tried, WASHINGTON J. would not say that a state could sue at law for such an incorporeal right as that of sovereignty and jurisdiction, but said that even if a court of law would not afford a remedy, he saw no reason why a remedy should not be obtained in a court of equity. The state of New York might, he thought, file a bill against the state of Connecticut, praying to be quieted as to the boundaries of the disputed territory: and this Court, in order to effectuate justice, might appoint commissioners to ascertain and report those boundaries. CUSHING J. intimated that a state has a remedy under the constitution and law to determine a contest of jurisdiction. But PATERSON J. declared that it was not necessary to determine how far a suit might, with effect, be instituted in the Supreme Court to decide the right of jurisdiction between two states, abstractedly from the right of soil.(i)

Whether a state might institute proceedings in the

(g) *Fowler v. Lindsey*. 3 Dall. 411.

(h) *Ib.* *New York v. Connecticut et al.* 4 Dall. 3.

(i) *Fowler v. Lindsey*. 3 Dall. 411. See *New York v. Connecticut et al.* 4 Dall. 3, 4. note, where the state filed a bill in equity, in the Supreme Court, praying an injunction, but the Court refused it because the state was not a party to the suits below, nor interested in the decision of them.

Supreme Court to annul a contract made by it in a law passed by its legislature, on the ground of fraud and corruption in the members of such legislature, query. It is certain that individuals cannot bring such questions incidentally and collaterally before the Court. And if a bill were filed by the state for such purpose, third persons, purchasers for a valuable consideration, having no notice of such fraud and corruption, would have a good title.(k)

In a criminal case that occurred in the year 1793, in the Circuit Court, it was contended that the word *original* in the constitutional grant of jurisdiction to the Supreme Court, meant *exclusive*, and that Congress could not vest jurisdiction in any other court in the cases enumerated in the second clause of the second section of the third article.(l) It was therefore contended that the Circuit Court had no jurisdiction in an indictment against the defendant, who was consul from Genoa, under the grant to the Circuit Court of criminal jurisdiction by the 11th sec. of the act of September 24th, 1789; and of this opinion was IREDELL J. But WILSON J. and PETERS, District Judge, were of opinion that the constitution did not preclude Congress from vesting a concurrent jurisdiction in such inferior Courts as they might establish, and having done so as to the Circuit Court, it had jurisdiction. And with this the opinion of IREDELL J. previously delivered in the case of *Chisholm v. Georgia*,(m) seems to concur.

That the understanding of the first Congress was, that the word original did not mean exclusive, appears from the 13th sec. of the act of September 24th, 1789,

(k) *Fletcher v. Peck*. 6 Cranch, 87.

(l) *United States v. Ravara*. 2 Dall. 297.

(m) 2 Dall. 419. See *Cohens v. Virginia*. 6 Wheat. 692. *Commonwealth v. Kosloff*. 5 Serg. and Rawle, 545.

which declares the jurisdiction of the Supreme Court in several cases embraced in the constitutional grant of original jurisdiction to the Supreme Court, to be "original but not exclusive;" and from the 11th section of that act, by which jurisdiction is given to the District Court in all suits against consuls, except those of a certain description.⁽ⁿ⁾

In *Marbury v. Madison*,^(o) it was held, that Congress cannot vest in the Supreme Court original jurisdiction in a case in which the Constitution had clearly not given that Court original jurisdiction, and that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases, or else the clause would be inoperative and useless. The 13th sec. of the act of 24th September, 1789, vests in the Supreme Court power to issue writs of mandamus in cases warranted by the principles and usages of law, to any Courts appointed, or persons holding office under the authority of the United States. It was determined, in that case, that the authority given by this section, to issue a mandamus to public officers, was a grant of original jurisdiction not warranted by the Constitution, because it was not within the specified cases in which the Supreme Court is by the Constitution vested with original jurisdiction, and the act of Congress, in this respect, was held to be void. The Court, therefore, refused to issue a mandamus to the Secretary of State of the United States, commanding him to deliver to the persons appointed, commissions of Justices of the Peace for the district of Columbia, which had been

⁽ⁿ⁾ 2 Dall. 419. See *Cohens v. Virginia*. 6 Wheat. 692. *Commonwealth v. Kosloff*. 5 Serg. and Rawle, 545.

^(o) 1 Cranch, 137. See the opinion explained, *Cohens v. Virginia*. 6 Wheat. 400, 401.

signed by the President of the United States, and sealed with the great seal, though they were of opinion that the parties complaining were entitled to the commissions.(p)

(p) *Marbury v. Madison*. 1 Cranch, 137.

CHAPTER III.

SUPREME COURT—ORIGINAL JURISDICTION—PRACTICE.

By the 14th sec. of the act of September 24th, 1789, all the Courts of the United States have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

By the 17th sect. of the act of September 24th, 1789, all the Courts of the United States have power to impose and administer, all necessary oaths or affirmations; and to punish, by fine or imprisonment, at the discretion of said Courts, all contempts of authority in any case or hearing before them: and to make and establish all necessary rules for the orderly conducting business in the said Courts: *provided* such rules are not repugnant to the laws of the United States.

The Supreme Court possesses, without the provision of written law, a power over their own officers, and to protect themselves and their members from being disturbed in the exercise of their functions;

such as to fine for contempt, imprison for contumacy, and enforce the observance of order.(a) They could have exercised the power to fine and imprison for contempts without the aid of this act of Congress ; or in cases, if such should occur, to which its provision does not extend. The act is a legislative assertion of a right as incidental to a grant of judicial power, and is to be considered either as an instance of abundant caution, or as a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits, namely, fine and imprisonment.(b)

The act of May 8th, 1792, sec. 1. provides that all writs and processes issuing from the Supreme, or a Circuit Court, shall bear teste of the Chief Justice of the Supreme Court, or, (if that office be vacant) of the Associate Justice next in precedence; and all writs and processes issuing from a District Court shall bear teste of the Judge of such Court, or, (if that office shall be vacant,) of the clerk thereof, which said writs and processes shall be under the seal of the Court from whence they issue, and signed by the clerk thereof. The seals shall be provided at the expense of the United States.(c)

By sec. 2, the forms of writs, executions, and other process, *except their style*,(d) and the forms and modes

(a) *Ex parte Bollman and Swartwout*. 4 Cranch, 93. *United States v. Hudson and Goodwin*. 7 Cranch, 34.

(b) *Anderson v. Dunn*. 5 Wheat. 227, 228. See also *Ex parte Kearney*. 7 Wheat. 38.

(c) By an act passed the 29th September, 1789, entitled "An Act to regulate processes in the Courts of the United States," the same provision was made, and under its authority the Supreme Court, at February term, 1790, established a seal for that Court and the Circuit Courts. See 2 Dall. 399. This act was continued till the end of the session of 1791-2, by the act of February 18th, 1791, and was then suffered to expire.

(d) Query the meaning of these words here. The style of the process of this Court, until altered by law, was fixed by the Court

of proceeding in suits, in those of common law, shall be the same as are now used in the said Courts respectively, in pursuance of the act entitled "An act to regulate processes in the Courts of the United States,"(e) in those of Equity, and Admiralty and maritime jurisdiction, shall be according to the principles, rules, and usages which belong to Courts of Equity, and to Courts of Admiralty respectively, as contradistinguished from Courts of Common Law; except so far as may have been provided for by the act of 24th September, 1789: subject, however, to such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court shall think proper, from time to time, by rule to prescribe to any Circuit or District Court concerning the same.(f)

At August term, 1792, the Supreme Court ruled, that they considered the practice of the King's Bench and Chancery in England, as affording outlines for the practice of this Court; and that they would from time to time make such alterations therein as circumstances might render necessary.(g)

The act of March 2, 1793, sec. 7, provides, that it shall be lawful for the several Courts of the United

at February term, 1790, to be "the President of the United States." 2 Dall. 400. That style has continued ever since in the Supreme Court and District Courts.

(e) The act of 29th September, 1789. This act directed that the forms of writs and executions, except their style, and modes of process in the Circuit and District Courts, should be the same in each state respectively, as were then used and allowed in the Supreme Courts of the same, until further provision was made, and except where by that act, or other statutes of the United States, was otherwise provided. It made no provision, in this respect, for the Supreme Court.

(f) The act of 29th September, 1789. provided that the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction should be according to the course of the civil law.

(g) 4 Dall. 411.

States, from time to time, as occasion may require, to make rules and orders for their respective Courts, directing the returning of writs and processes, the filing of declarations, and other pleadings, the taking of rules, the entering and making up judgments by default, and other matters in the vacation—and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said Courts respectively, as shall be fit and necessary for the advance of justice, and especially to that end to prevent delays in proceedings.

As, notwithstanding the 11th article of the amendments to the Constitution, there are cases in which a state may be sued by original process in the Supreme Court, the decisions on the practice in such cases may be useful.

In a suit against a state, the delivery of a copy of the writ to the Governor and Attorney General of such state is a good service.^(h) And if the state do not appear after such service, on proclamation being made the Court will grant a rule to shew cause why, on non appearance by a certain day, judgment by default should not be entered against such state.⁽ⁱ⁾

Where the state refused to appear in an action of assumpsit, after the writ had been duly served, the Court ordered the plaintiff to file his declaration by a certain day, and that certified copies thereof should be served on the Governor and Attorney General, and that unless the state in due form appeared, or shewed cause to the contrary in that Court, by the first day of the next term, judgment by default should be entered. Judgment by default was afterwards entered accordingly, and a writ of inquiry awarded.^(k)

^(h) *Chisholm v. The State of Georgia*. 2 Dall. 419. *Huger v. The State of South Carolina*. 3 Dall. 339.

⁽ⁱ⁾ *Oswald v. The State of New York*. 2 Dall. 415.

^(k) *Chisholm v. The State of Georgia*. 2 Dall. 419, 420.

So in a suit in equity, if a subpoena issued out of this Court has been duly served, and the state do not appear, the complainant is entitled to proceed *ex parte*: and in this case, the complainant moved for, and obtained commissions to take the examination of witnesses in several of the states.^(l)

If a party, having a right to sue in this Court, as for instance, a state or a foreign minister wish to institute a suit against a person confined by process of an inferior Court of the United States, there need be no process, such as is used in England, by *habeas corpus ad respondendum*, to bring his body actually into Court. An original writ from this Court being directed to the marshal of the district, who has charge of his person, would require him to take the defendant into custody, and confine him in the same gaol where he is already confined, till he gives bail.^(m) Nor would such writ lie where the defendant is confined by process from a state Court: for a state Court is not an inferior Court in any sense, except in the particular cases in which an appeal lies from their judgment to this Court; and in these cases the mode of proceeding is particularly described, and is not by *habeas corpus*.⁽ⁿ⁾

By a rule of Court, made at February term, 1790, the clerk of the Supreme Court is to reside and keep his office at the seat of the national government, and is prohibited from practising as an attorney or counsellor in the Supreme Court, while he continues clerk. Attornies or counsellors must have been such for three years, in the Supreme Courts of the state to which they belong, and their private and professional characters must appear to be fair before they can be admitted to practise in this Court: and their oath or affirmation is prescribed.

^(l) *Huger v. The State of South Carolina*. 3 Dall. 3.

^(m) *Ex parte Bollman and Swartwout*. 4 Cranch, 97.

⁽ⁿ⁾ *Ib.*

CHAPTER IV.

SUPREME COURT—APPELLATE JURISDICTION.

THE Appellate Jurisdiction of the Supreme Court depends on the 3d article of the Constitution, (sec. 2, 2.) which provides that, in all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as Congress shall make.

In the construction of this clause it has been held, that it vests in the Supreme Court, an appellate jurisdiction in all cases where original jurisdiction is given to the inferior Courts, with only such exceptions, and under such regulations as Congress may make.^(a) For though the decision and reasoning in the case of *Marbury v. Madison*,^(b) would seem to imply it,^(c) yet the clause giving the Supreme Court appellate jurisdiction *in all other cases* than those in which original jurisdiction is granted, does not deprive the Supreme Court of appellate jurisdiction in any cause originating in the inferior Courts of the United States, or in any case in the highest Courts of the states when such case arises under the constitution, laws, or treaties. The original jurisdiction vested in the Supreme Court by the Constitution, is founded entirely on the character of the parties. In its appellate jurisdiction, the character of the parties does not govern, but the cha-

(a) *Wilson v. Mason*. 1 Cranch, 22.

(b) 1 Cranch, 137.

(c) See *Commonwealth v. Kosloff*. 5 Serg. and Rawle, 545, and the reasoning of the Court, *Cohens v. Virginia*. 6 Wheat. 399.

acter of the case. It is, therefore, no objection to the exercise of its appellate jurisdiction that the character of the parties is such that it might have entertained original jurisdiction. Thus in a case arising in a state Court, under the laws of the United States, it is no objection to the appellate power of this Court, that a state is party : nor in a case decided in a Circuit Court of the United States, that an ambassador or consul is party : but an appeal or writ of error lies in such cases.(d)

Had Congress simply erected a Supreme Court and inferior Courts, without saying in what cases a writ of error or appeal should lie, the Supreme Court would have possessed all the appellate jurisdiction which the Constitution embraces ; but as Congress has power to limit the exercise of its appellate jurisdiction, and to make exceptions respecting its exercise, and under that power has declared in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. For it seems it is a general principle applicable as well to the appellate power of the Supreme Court as to the inferior Courts established by acts of Congress, that the judicial power granted by the Constitution, can only be exercised in the cases and in the modes prescribed by act of Congress : the Constitution and laws must both concur in order to vest it.(e)

Under the acts of Congress, the appellate jurisdiction given by the Constitution, is exercised by the Supreme Court in the following different modes.

1. By writ of error, from final judgments of the Circuit Courts ; of the District Courts, exercising the

(d) *Cohens v. Virginia*. 6 Wheat. 392.

(e) *United States v. Moore*. 3 Cranch, 170. *Durousseau v. The United States*. 6 Cranch, 312. *Wilson v. Mason*. 1 Cranch, 91. *Wiscart v. Dauchy*. 3 Dall. 237. See *post*. Circuit Court.

powers of Circuit Courts, and of the superior Courts of territories, exercising the powers of Circuit Courts in certain cases.

2. By appeal from final decrees of the Circuit Courts, of the District Courts exercising the powers of Circuit Courts, and of the superior Courts of territories exercising the powers of Circuit Courts in certain cases.

3. By writ of error from the final judgments and decrees of the highest Court of law or equity in a state, in certain cases.

4. By certificate from a Circuit Court, that the opinions of the Judges are opposed on points stated.

5. By mandamus, prohibition, habeas corpus, certiorari, procedendo.

CHAPTER V.

SUPREME COURT—WRITS OF ERROR TO COURTS OF THE UNITED STATES.

THE act of 24th September, 1789, declares, in sec. 13, that the Supreme Court shall have appellate jurisdiction from the Circuit Courts in the cases therein after provided for. And in sec. 22, after enacting that final decrees and judgments in civil actions, in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed, or affirmed in a Circuit Court, holden in the same district, upon a writ of error, whereto shall be annexed, and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the Judge, &c., the adverse party having at least twenty days' notice, it provides, that upon a like process may final judgments and decrees in civil actions, and suits in equity, in a Circuit Court, brought there by original process, or removed there from Courts of the several states, or removed there by appeal from a District Court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed, or affirmed in the Supreme Court; the citation being, in such case, signed by a Judge of such Circuit Court, or Justice of the Supreme Court, and the adverse party having, at least thirty days' notice. But there shall be no reversal in either Court on such writ of error, for error in ruling any plea in abate-

ment, other than a plea to the jurisdiction of the Court, or such plea to a petition or bill in equity as is in the nature of a demurrer, or for any error in fact.

The cases in which writs of error lie from the Supreme Court, to Courts of the United States, are regulated by,

1. The Courts.
2. The nature of the judgments rendered.
3. The parties.
4. The value of the matter in dispute.
5. The time within which such writ of error must be brought.

1. Of the Courts to which writs of error lie.

We have seen that by the 12th and 22d sections of the act of September 24th, 1789, a writ of error lies to the final judgments of the Circuit Courts in certain cases.

By other acts of Congress, a writ of error lies from the Supreme Court to most of the District Courts exercising the powers of Circuit Courts ;(*a*) and in relation to Courts of this description the following decision has been made, which, as these Courts are all erected on the same model, may be considered as establishing a general rule in relation to them.

The act of March 26, 1804, erecting Louisiana into two territories, established a District Court in the ter-

(*a*) See *post*. District Court—Organization.

ritory of Orleans, consisting of one Judge, who was in all things to have and exercise the same jurisdiction and powers which were by law given to, or might be exercised by, the Judge of Kentucky district. The act of September 24th, 1789, sec. 10, had vested the District Court of Kentucky with the powers of a Circuit Court, and provided that writs of error and appeals should lie from decisions therein, to the Supreme Court, in the same causes as from a Circuit Court to the Supreme Court, and under the same regulations. It became a question under these acts, whether a writ of error lay from the Supreme Court to the District Court of the territory of Orleans, in a common law suit, in which the District Court, as such, had original jurisdiction.

It was decided,

1. That merely by the appellate powers granted to the Supreme Court in the Constitution no writ of error lay, because the appellate jurisdiction of the Supreme Court is limited and regulated by the act of September 24th, 1789, and other acts, and all cases in which appellate jurisdiction is not given to the Supreme Court by act of Congress are excepted.

2. That the intent of the act of September 24th, 1789, sec. 10, was to give a writ of error from the Supreme Court to the District Court of Kentucky district, in all cases there decided, which, if decided in a Circuit Court, either in an original suit or on an appeal, would be subject to a writ of error.

3. That the intent of the act of March 26, 1804, was to place the District Court of the territory of Orleans, in all respects, on a footing with the District

Court of the Kentucky district, and therefore a writ of error well lay in that case.(b)

But where the act establishing a District Court, with the powers of a Circuit Court, directs that writs of error shall lie from its decisions to a particular Circuit Court, (as was the case as to the district of Maine, by the 10th sec. of the act of September 24th, 1789,) no writ of error lies to such District Court from the Supreme Court, although such District Court has all the original jurisdiction of a Circuit Court.(c)

On the ground that no act of Congress had authorized an appeal or writ of error from the General Court of the Northwestern Territory, it was decided in 1803, that a writ of error from the Supreme Court to that Court could not be sustained.(d) But by the act of March 3, 1805, sec. 1, the Superior Courts of the several territories of the United States, in which a District Court has not been established by law, shall, *in all cases in which the United States are concerned*, have, and exercise, within their respective territories, the same jurisdiction and powers which are by law given to, or may be exercised by, the District Court of Kentucky district, and writs of error and appeals shall lie from decisions therein, to the Supreme Court for the same causes, and under the same regulations as from the said District Court of Kentucky District.

In one instance a writ of error was taken out from the Supreme Court to the Circuit Court of the District of Columbia in a criminal case, and the judgment of the Circuit Court was affirmed; but no question was raised as to the jurisdiction.(e) But it was after-

(b) *Durosseau v. The United States*. 6 Cranch, 307. See Organization of District Court—Appeal.

(c) *United States v. Weeks*. 5 Cranch, 1.

(d) *Clarke v. Bazadone*. 1 Cranch, 212. See Territorial Courts.

(e) *United States v. Simons*. 1 Cranch, 252.

wards decided that no writ of error lies from the Supreme Court to the Circuit Court of the United States or of the District of Columbia, in criminal cases.^(f) The only mode in which such cases can be removed from the former, is by a certificate, that the opinions of the Judges are opposed. The denial of this authority to sustain a writ of error, it is said, proceeded upon great principles of public policy and convenience. If every party had a right to bring before this Court every case in which judgment had passed against him for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases, totally frustrated; and as this Court cannot *directly* revise a judgment of the Circuit Court in a criminal case, it cannot do it indirectly through the medium of a *habeas corpus* to bring up a person in custody under such judgment.^(g)

2. Of the nature of the judgments rendered in the Courts below.

To sustain a writ of error from the Supreme to the Circuit Court, the judgment in the latter, must be a judgment in a suit originally brought there, or removed thither from a State Court. It does not lie upon a judgment rendered in the Circuit Court in a cause brought from the District to the Circuit Court by writ of error; for the 22d section of the act of September 24th, 1789, allows a writ of error from the Supreme to the Circuit Court, only in civil actions that are brought there by original process, or removed from the Courts of the several states.^(h)

^(f) United States v. More. 3 Cranch, 159. United States v. La Vengeance. 3 Dall. 297.

^(g) Ex parte Kearney. 7 Wheat. 42.

^(h) United States v. Goodwin. 7 Cranch, 108. United States v. Gordon. 7 Cranch, 287. United States v. Barker. 2 Wheat.

The general principle is, that a writ of error lies only from the final judgment of the Circuit Court. Therefore where the Circuit Court overruled the defendant's plea to a bill in equity, and ordered him to answer, it was held that no writ of error lay under the act of September 24th, 1789, on this order.⁽ⁱ⁾ So, where the Court below stayed proceedings in a suit instituted by the plaintiff against the defendant to be restored to the possession of the batture at New Orleans, on the suggestion of the District Attorney, it seems a writ of error was not the proper remedy, but a mandamus in the nature of a procedendo.^(k)

But though the judgment below is imperfect and informal, yet if it is not merely interlocutory, but goes to the whole merits of the case, and is in its nature final, so that an execution might issue upon it, the defendant is entitled to a writ of error. As where the declaration in the Circuit Court was in debt upon a bond in the penal sum of 60,000*l.*, which had been taken from the defendant below, as an indemnity in an attachment brought by him and others, against the plaintiff, in a State Court. The defendant pleaded 1, performance; 2, that no costs had been awarded to the plaintiff below, in the attachment suit, nor had any damages been recovered by him for the suing of the attachment. The plaintiff replied, 1, that the defendant had not performed the condition. 2, That the Court did award costs, which he was ready to verify by a transcript of the record. 3, He demurred to so much of the plea as respected damages. The defendant rejoined, 1, As to the costs, nul tiel record; 2, As to the damages, he

395. *United States v. Ten Brock.* 2 Wheat. 242. In the last case, it being probable the question raised on the record would frequently occur, the Court, at the desire of the Attorney General, gave an opinion on the case, and afterwards dismissed the writ of error.

(i) *Rutherford v. Fisher.* 4 Dall. 22.

(k) *Livingston v. Dorgenois.* 7 Cranch, 597.

joined in the demurrer. The Court gave judgment that the second plea of the defendant was not sufficient to bar the plaintiff, and gave judgment for the plaintiff on his demurrer to that plea. The issue was tried by jury, who found for the plaintiff the debt in the declaration mentioned, to be discharged by the payment of 1800 dollars damages. One objection to the writ of error was, that no judgment was given on the rejoinder of nul tiel record. But the Court held that the writ of error lay.^(l)

A writ of error lies from the Supreme to the Circuit Court of the district of Columbia, to remove a judgment awarding a peremptory mandamus to admit the defendant in error to office, provided the matter in dispute be sufficient in value.^(m)

If the judgment of a Circuit Court be reversed by the Supreme Court on error brought, and a mandate is issued to it to carry into effect the judgment of the Supreme Court agreeably to the 24th section of the act of September 24th, 1789, and such Circuit Court does not correctly execute the mandate, a writ of error is the proper remedy.⁽ⁿ⁾ But it seems the merits of the original judgment cannot be thereby again inquired into.^(o)

It seems, as a general rule, that a writ of error will not lie to a decision upon a matter within the discretion of the Court below.^(p) Thus, if the Court below refuse to set aside a nonsuit, and grant a new trial, a writ of error does not lie,^(q) nor does it lie upon a refusal to reinstate a cause after it has been dismissed

(l) *Wilson v. Daniel*. 3 Dall. 401.

(m) *Columbian Insurance Company v. Wheelwright et al.* 7 Wheat. 534. See *McClung v. Silliman*. 6 Wheat. 598. A writ of error on a dismissal of a motion for a mandamus.

(n) *Martin v. Hunter's Lessee*. 1 Wheat. 354.

(o) *Bowdler v. McArthur*. 7 Wheat. 58.

(p) *Young v. Clark*. 7 Cranch, 569.

(q) *United States v. Evans*. 5 Cranch, 280.

by the parties,^(r) nor upon a judgment of nonsuit.^(s)

It cannot be assigned for error that the Court below refused a continuance of the cause, after issue joined, on account of the absence of a material witness,^(t) or refused to grant a new trial,^(u) or to allow a plea to be amended,^(v) or a new one to be filed,^(x) or allowed several pleas in a writ of right,^(y) or that the Court permitted a special replication to be substituted for a general one.^(z) But a case may occur where it would be error in a Court, after having allowed one party to amend, to refuse to suffer the other to amend also, before trial.^(a) In *Young v. Black*,^(b) the former opinions of the Court, as to allowing a writ of error in cases depending on the discretion of the Court, were recognized as law, but it was declared that they are not to be extended further.

It is doubtful whether a refusal by the Court below to compel a party to join in a demurrer to evidence, can, in any case, be assigned for error. But, it is certainly not error in the Court to refuse this, if the party demurring will not admit the facts which the other party attempts to prove, or offers evidence to contradict them, or endeavours to establish propositions inconsistent with the evidence of the other party.^(c)

But a writ of error lies it seems on a bill of exceptions to instructions given by the Court below, to triers

(r) *Welch v. Mandeville*. 7 Cranch, 152.

(s) *Van Ness v. Buel*. 4 Wheat. 73.

(t) *Woods v. Young*. 4 Cranch, 257. See *Marine Insurance Company v. Hodgson*. 6 Cranch, 217.

(u) *Henderson v. Moore*. 5 Cranch, 11. *Marine Insurance Company v. Hodgson*. 5 Cranch, 187. 6 Cranch, 217. *S. C. Barr v. Gratz*. 4 Wheat. 213.

(v) *Moss v. Riddle*. 5 Cranch, 358.

(x) *Marine Insurance Company v. Hodgson*. 6 Cranch, 217.

(y) *Liter v. Green*. 2 Wheat. 306.

(z) *Mandeville v. Wilson*. 5 Cranch, 17.

(a) *Ibid*.

(b) 7 Cranch, 569.

(c) *Young v. Black*. 7 Cranch, 569,

determining on a challenge of a juror for cause,^(d) and it seems to a refusal by the Court below to rule the party to grant over of letters testamentary.^(e)

As the consent of parties cannot give jurisdiction, and it is the error of the Court below to sustain a cause in which they had no jurisdiction, the plaintiff in error may assign for error that the Court to which, as plaintiff below, he had chosen to resort, had not jurisdiction.^(f)

It seems no writ of error lies to this Court upon an error in fact, such as the death of a party, as the 22d section of the act of September 24th, 1789, prohibits any reversal for error in fact.^(g)

The parties are not precluded from bringing a writ of error on the final judgment, and thereby bringing the whole case before the Court, by the circumstance, that the case has been before removed by a certificate that the opinions of the Judges were opposed; because, on such removal, the Court considers only the questions on which the Judges were opposed, and not the whole case.^(h)

It seems also, that if a motion be made to a State Court for a *mandamus* to an officer of the United States, and the Court sustain their jurisdiction, but on a view of the merits of the claim dismiss the motion, appeals may be made to this Court from both decisions, by writ of error.⁽ⁱ⁾

If a verdict be general, subject to the opinion of the Court, on a statement of facts, which facts appear on the record, this Court will consider them on error brought, and decide according to the law arising upon

^(d) *Mimia v. Hepburn.* 7 Cranch, 290.

^(e) *Wilson v. Codman's executor.* 3 Cranch, 193.

^(f) *Capron v. Van Norden.* 2 Cranch, 126. See *post.* Appearance.

^(g) *Penhallow v. Doane.* 3 Dall. 54.

^(h) *Lee v. Ogle.* 2 Cranch, 33.

⁽ⁱ⁾ *McClung v. Silliman.* 6 Wheat. 598.

them.(*k*) But the report of a judge who tried the cause, of the facts upon which an application to the Court was made to grant relief, or for a new trial, where there is a general verdict without reference to those facts, is no part of the record.(*l*) And if the verdict below be for the defendant, subject to the opinion of the Court on the points reserved, and judgment be entered accordingly, and there be no statement of the facts or points reserved on the record, the judgment will be reversed, and a *venire facias de novo* awarded: the facts ought to appear so that the judgment might be reversed or affirmed on its merits.(*m*)

Though the bill of exceptions brought up by writ of error, states in general terms, that the Court below instructed the jury, "that the several matters and things allowed and proved, were not sufficient to bar the plaintiff, nor constituted any defence;" yet the Supreme Court will entertain the writ of error, and look through the record, to examine whether the instructions should have been different. But such a mode tends to embarrass a Court of error, more than if the matters complained of appeared distinctly.(*n*) Only so much however of the charge of the Court as is essential to the merits of the cause should be stated on the record; the practice of stating it *in extenso* on the record is unnecessary and inconvenient. The Court, where matters are incidentally introduced into the charge, for purposes of argument or illustration, will examine only the substance of it, and if it appear upon the whole, that the law was justly expounded to

(*k*) *Faw v. Roberdeau's Executors.* 3 Cranch, 174. *Tucker v. Oxley.* 5 Cranch, 34. *Brent v. Chapman.* 5 Cranch, 358.

(*l*) *Inglee v. Coolidge.* 2 Wheat. 263.

(*m*) *Smith v. The Delaware Insurance Company.* 7 Cranch, 434.

(*n*) *Otis v. Walter.* 2 Cranch, 22.

the jury, general expressions, which may need, and would receive qualification, if they were the direct point in judgment, are to be understood in such restricted sense.(o)

A compact between the Legislatures of two States since the adoption of the Constitution, in relation to titles to land, and the mode in which the Courts should determine them, cannot deprive the Supreme Court of its appellate jurisdiction granted by the Constitution and laws. If, therefore, such compact had provided, that from the decisions in relation to titles in the State Courts, no appeal or writ of error should be allowed, yet it would not take away the right of the Supreme Court to sustain a writ of error to the District Court, (acting as a Circuit Court), to which the cause had been removed from the State Court, in which it was commenced.(p)

3. As to the parties.

No suit can be commenced or prosecuted against the United States: the acts of Congress do not authorise such a suit. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favour of the United States into a Superior Court, where they have, like those of an individual, been re-examined, and affirmed, or reversed.(q)

4. In respect to the value of the matters in dispute.

The writ of error is given, as we have before seen, by the 22d sec. of the act of September 24th, 1789, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs. This af-

(o) *Evans v. Eaton.* 7 Wheat. 426.

(p) *Wilson v. Mason.* 1 Cranch, 92.

(q) *Cohens v. Virginia.* 6 Wheat. 411, 412.

firmative description implies a negative of all cases where the matter in dispute is of the sum or value of two thousand dollars or less: and in these cases, a writ of error does not lie.(r)

Where an action of debt was instituted on a bond in the penal sum of 60,000*l.*, conditioned for the performance of certain things, and the jury gave a verdict for the plaintiff, for the debt mentioned in the declaration, to be discharged by the payment of 1800 dollars damages, and the judgment was entered for the sum of 60,000*l.*, debt, and the costs, to be discharged by the payment of the said 1800 dollars and the costs, the Court, (WILSON and IREDELL J. diss.,) held, that the judgment was to be considered as a judgment at common law for the penalty of the bond, and, therefore, that the Court had jurisdiction in error, and affirmed the judgment.(s) But where debt was brought on a bond given by the defendant for 20,000 dollars, conditioned for the faithful performance of his duty as marshal, and in reply to the plea of performance, the plaintiff assigned as a breach, the not paying over 328 dollars, and judgment was given for the defendant, the Court held the sum in dispute to be less than 2,000 dollars, and that they had not jurisdiction on a writ of error.(t)

In actions for damages, as trover, trespass, &c., if the judgment below be for the plaintiff, that judgment ascertains the sum in dispute.(u) If the judgment be for the defendant, the Supreme Court has not, by any rule or practice, fixed the mode of ascertaining that value. It seems however, that the sum claimed in

(r) *Durousseau v. The United States.* 6 Cranch, 314.

(s) *Wilson v. Daniel.* 3 Dall. 401. 2 Dall. 360. Note.

(t) *United States v. M'Dowel.* 4 Cranch, 316.

(u) *Cooke v. Woodrow.* 5 Cranch, 13. See *Wilson v. Daniel.* 3 Dall. 401.

damages in the declaration is to be considered the sum in dispute.(x)

But in an action for property, as detinue, &c., where the value of the matter in dispute does not conclusively appear on the record, the Court will admit affidavits to shew the real value of the matter in dispute, and to sustain their jurisdiction;(y) but it seems the writ of error is not to be a supersedeas.(z) Thus, in an action of dower brought in the Circuit Court by the plaintiff below, in which she recovered judgment on demurrer, and the value of the property did not appear in the record, the Court made a rule which is considered as a general rule,(a) that the plaintiff in error should be allowed to obtain affidavits to shew the real value, to be taken on a certain number of days notice to the defendant or her counsel in the State from which the record was returned: the rule as to affidavits to be mutual.(b) So on a supplemental bill in equity, praying a discovery of title and surrender of land in satisfaction of a prior decree: affidavits will be allowed, to shew the value of the land to be sufficient to authorise a writ of error, where it does not appear in the record.(c) So, where in replevin, the replevin bond was in the penal sum of 1200 dollars, and therefore *prima facie*, the matter in dispute was not within the jurisdiction of this Court in error, time was allowed to procure affidavits to rebut: but not being obtained by the last day of the term, the writ of error was dismissed.(d) For it seems it is incumbent on the

(x) *Cooke v. Woodrow*. 5 Cranch, 13.

(y) *Williamson v. Kincaid*. 4 Dall. 20.

(z) *Cooke v. Woodrow*. 5 Cranch, 13.

(a) 1 Cranch, xviii.

(b) *Williamson v. Kincaid*. 4 Dall. 20.

(c) *Course v. Stead*. 4 Dall. 22.

(d) *Rush v. Parker*. 5 Cranch, 287.

plaintiff in error, to shew that the Supreme Court has jurisdiction.(e)

So, as a writ of error lies from the Supreme to the Circuit Court of the district of Columbia, to remove a judgment rendered by such Circuit Court awarding a peremptory mandamus to restore certain persons to office, where the matter in dispute is of sufficient value, the Court to ascertain that, will direct the plaintiffs in error to furnish affidavits; but if it do not appear on such affidavits, that the value of the matter in dispute is sufficient to give this Court jurisdiction, the writ of error will be quashed. And in such case the value of the office is the only matter in dispute, and its value must be ascertained by the salary.(f)

5. Within what time a writ of error must be brought.

By the 22d sec. of the act of September 24th, 1789, writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability.

(e) *United States v. The Brig Union*. 4 Cranch, 216. See Appeal, (value.)

(f) *Columbian Insurance Company v. Wheelwright*. 7 Wheat. 534.

CHAPTER VI.

SUPREME COURT—APPEALS. .

IN cases of equity and of admiralty and maritime jurisdiction, the decrees of the Courts below are now removed to the Supreme Court by appeal, as well from the Circuit Courts, as from the District Courts acting as Circuit Courts,^(a) and from the Superior Courts of territories, in cases in which the United States are concerned.^(b)

Formerly, these cases, by the provision of the 22d section of the act of September, 24th, 1789, were removed by writ of error, in the same manner as judgments in common law proceedings, and no other mode was permitted.^(c) In order to furnish the Supreme Court with the facts of the case, the 19th section of the act of September 24th, 1789, made it the duty of the Circuit Courts, in causes in equity, and of admiralty and maritime jurisdiction, to cause the facts on which they founded their sentence or decree, fully to appear on the record, either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagreed, by a stating of the case by the Court. It was held, under this act, that if a case were removed, with a statement of facts, and also with the evidence, still the statement was conclusive as to all the facts contained

(a) *Durousseau v. The United States.* 6 Cranch, 397.

(b) Act of March 3, 1805, sect. 1. See *ante* 30, of Writs of Error to the Courts of the United States.

(c) *Blaine v. The ship Charles Carter.* 4 Dall. 22. *Wiscart v. Dauchy.* 3 Dall. 327.

in it ;(*d*) and if no such statement of facts accompanied the record, the Court affirmed the decree, even though the evidence were annexed.(*e*) It was also held, that the decree of the Court below might be reversed in part, and affirmed in part; and the Court was not bound by the common law doctrine of reversals. It might award the costs of the Court below to be paid or not, in its discretion, and order the parties to pay their own costs in the Supreme Court.(*f*)

This system being found inconvenient,(*g*) it was abolished by the act of 13th February, 1801, establishing a new system of Circuit Courts. But this act being repealed in the following year by the act of March 8th, 1802, the system was, for a short time, inadvertently revived, till the passage of the act of March 3, 1803.(*h*)

By the 2d section of the act of March 3, 1803, from all final judgments or decrees, rendered or to be rendered in any Circuit Court, or in any District Court, acting as a Circuit Court, in any cases of equity, of admiralty and maritime jurisdiction, and of prize or no prize, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars, shall be allowed to the Supreme Court of the United States ; and upon such appeal, a transcript of the libel, bill, answer, depositions, and all other proceedings, of what kind soever, in the cause, shall be transmitted to the said Supreme Court, and no new evidence shall be received in the said Court on the hearing of such appeal, except in admiralty and prize causes ; and such appeals shall be

(*d*) *Jennings v. The brig Perseverance.* 3 Dall. 336.

(*e*) *Ib. Hills v. Ross.* 3 Dall. 184.

(*f*) *Penhallow v. Doane.* 3 Dall. 54.

(*g*) See opinion of Ellsworth C. J. *Wiscart v. Dauchy.* 3 Dall. 328. and *The San Pedro.* 2 Wheat. 141.

(*h*) *United States v. Hooe.* 1 Cranch, 318.

subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error. And the Supreme Court is thereby authorised to receive, hear, and determine, such appeals. And so much of the 19th and 22d sections of the act of 1789, as came within the purview of that act, it was declared should be, and the same were thereby repealed.

Since this act, causes of equity, and of admiralty and maritime jurisdiction cannot be removed to the Supreme Court by writ of error, but only by appeal: and the removal by appeal must be under the same rules, regulations, and restrictions, as writs of error are subjected to by the act of September 24, 1789; namely, those which respect the time within which a writ of error shall be brought, and in what instances it shall operate as a *supersedeas*: the citation to the adverse party; the security to be given by the plaintiff in error, and the restrictions upon the appellate Court as to reversals in certain enumerated cases, and they must be substantially observed.(i) Where, however, an appeal is prayed at the same term in which the decree is pronounced, a citation is not necessary.(k) It follows, that in these causes an appeal may be taken at any time within five years, subject to the saving contained in the 22d section of the act of September 24, 1789.(l)

The writ of error submits to the revision of the Supreme Court only the law; but the remedy by appeal brings before the Supreme Court the facts as well as the law. It may correct on an appeal, not only wrong conclusions of law from the facts, but wrong conclusions of fact from the evidence.(m) For this

(i) *The San Pedro*. 2 Wheat. 132. See writ of error. Practice. post.

(k) *Ib.* *Reily v. Lamar*. 2 Cranch, 349.

(l) *The San Pedro*. 2 Wheat. 132.

(m) *Ib.*

purpose, all the testimony which was before the Circuit Court ought to be laid before this Court on an appeal: and where it appears on the record, that witnesses were examined in the Circuit Court, and were referred to in the decree, whose testimony does not appear in the record, the decree will be reversed, and the cause remanded.(n) The parties may wave testimony by consent, but if this consent do not appear, it will not be presumed.(o)

In admiralty causes, an appeal suspends the sentence altogether: it is not *res adjudicata*, till the final sentence of the appellate Court.(p) It is lawful to allege what was not before alleged, and to prove what was not before proved.(q)

The appellate power of the Supreme Court extends to remove an admiralty or maritime cause from the Circuit Court, brought there by appeal from the District Court: differing in this respect from a writ of error.(r) But, like a judgment on which a writ of error lies, the decree, in order to sustain an appeal, must be final. No appeal lies, therefore, from an interlocutory decree dissolving an injunction with costs,(s) nor from the decree of a State Court, affirming the decretal order of an inferior Court of Equity of the same State, refusing to dissolve an injunction granted on the filing of the bill.(t) But a decree for the sale of mortgaged property, upon a bill to foreclose, is a final decree, from which an appeal lies to the Supreme Court.(u) And though a decree of the

(n) Conn. v. Penn. 5 Wheat. 424.

(o) Ib.

(p) Yeaton v. The United States. 5 Cranch, 280.

(q) Ib.

(r) United States v. Goodwin. 7 Cranch, 108. Wiscart v. Dauchy. 3 Dall. 321. See *ante* §1, Writ of Error.

(s) Young v. Grundy. 6 Cranch, 51.

(t) Gibbons v. Ogden. 6 Wheat. 448.

(u) Ray v. Law. 3 Cranch, 179.

Court below be final, so far as respects the Court making it, it is not definitive as to the subject matter, while an appeal exists: and though, generally speaking, the province of an Appellate Court is to inquire whether a decree, when rendered, was erroneous or not, yet if between the decree and the decision of the Appellate Court, to which an appeal has been taken a law intervenes, such as a treaty, and changes the rule, the law must be obeyed.(x) So if a condemnation take place in the Court below, under a law then existing, and pending an appeal, and before condemnation in the Appellate Court, the law is repealed, without any special provision, the Appellate Court will reverse the condemnation,(y) though the proceeds were paid over to the appellee before the expiration of the law, and in this case will order restitution generally.(z)

Where a mandate is issued by this Court, on reversing the decree of an inferior Court, and that Court does not correctly execute the mandate, an appeal lies.(a) But on such appeal, nothing is before the Supreme Court but what is subsequent to the mandate ;(b) it does not authorise an inquiry into the merits of the original decree,(c) and it seems the Court will not, on motion, open their original decree.(d)

The Court, on appeal, will not take notice of the interest in the cause of parties who do not appeal. Where, therefore, there was an appeal by the claimant below from the decree of the Circuit Court, awarding salvage to the appellees, the Supreme Court would

(x) *United States v. Schooner Peggy*. 1 Cranch, 103.

(y) *Yeaton v. The United States*. 5 Cranch, 280.

(z) *Schooner Rachel v. The United States*. 6 Cranch, 329.

(a) *Martin v. Hunter's lessee*. 1 Wheat. 354. *Himely v. Rose*. 3 Cranch, 313.

(b) *Himely v. Rose*. 5 Cranch, 313.

(c) *Browder v. M'Arthur*. 7 Wheat. 58.

(d) *Himely v. Rose*. 5 Cranch, 313.

not inquire whether the Court below ought not to have decreed greater salvage to the appellees. *e*)

In an equity cause, the Circuit Court may invest in the stocks the proceeds of property sold by their order, notwithstanding the pendency of an appeal. *(f)* So on an appeal in an admiralty cause from the Circuit Court, the property in litigation, or its proceeds, do not follow the cause into the Supreme Court, because the Supreme Court acts only by mandate: and the Circuit Court may in such case order the disposition thereof, though it be there on appeal from the District Court. *(g)*

In respect to the sum or value of the matter in dispute the same principles seem, generally speaking, to apply to appeals as have been stated in relation to writs of error. *(h)* The appellant must shew, where the value is doubtful, that it is sufficient to give the Supreme Court jurisdiction: the Court below can neither give, nor take away its jurisdiction: nor is it given by the circumstance, that the claimants below, the appellees, had submitted their claim to the Court below. *(i)* It seems, a witness may be sworn *viva voce* as to the value. *(j)* If the District Court has had the property appraised by three sworn appraisers, which appraisement was no further acted upon, it is not conclusive evidence of the value, but it is better than the testimony of one witness. If the property had been delivered up to the claimants, on security given to the appraised value, it would have been conclusive of the value. *(k)* After deciding on evidence, that the value is not sufficient to sustain the appeal, the Court will

(e) M'Donough v. The Mary Ford. 3 Dall. 198.

(f) Spring v. The South Carolina Insurance Company. 6 Wheat. 519.

(g) The Collector. 6 Wheat. 203.

(h) Course v. Stead. 4 Dall. 22. See *ante*, 39.

(i) United States v. The Brig Union. 4 Cranch, 216.

(j) *Ib.*

(k) *Ib.*

not continue the case, in order to enable the appellant to procure affidavits to shew the value.^(l)

In matters of practice, in suits of equity as well as of admiralty and maritime jurisdiction, the act of May 3th, 1792,^(m) provides, that the forms of writs and other process except their style,⁽ⁿ⁾ and the forms and modes of proceeding, shall be according to the principles, rules, and usages which belong to Courts of equity, and to Courts of admiralty, respectively, as contra-distinguished from Courts of common law, except so far as may have been provided for by the act of September 24th, 1789,^(o) subject however to such alterations and additions as the said Courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court shall think proper from time to time by rule to prescribe, to any Circuit or District Court concerning the same. In conformity to these principles, in causes of equity, and of admiralty and maritime jurisdiction, the general rule of the Court is, to adopt the customs and usages of Courts of admiralty and equity, constituted on similar principles, with a discretionary power to adapt the practice and rules of the Court to the peculiar circumstances of this country, subject to the control of Congress.^(p) In prize causes especially, the allegations, the proofs, and the proceedings are in general modelled upon the civil law, with such additions and alterations as the practice of nations, and the rights of belligerents and neutrals, unavoidably impose. The Court of Prize is emphatically a Court of the Law of Nations: and does not take its character or rules from the mere municipal regulations of any country.^(q)

(l) United States v. The Brig Union. 4 Cranch, 216.

(m) See *ante* 20, Practice in original suits.

(n) See *ib.*

(o) See *ib.*

(p) Grayson v. The State of Virginia. 3 Dall. 320.

(q) The Schooner Adeline. 9 Cranch, 244.

A general power to make rules, in certain cases, is also given by the 7th section of the act of March 2, 1798.^(r)

By a rule of Court, made at February Term, 1816, ^(s) it was ordered, that in all cases where farther proof is ordered by the Court, the depositions which shall be taken shall be by a commission to be issued from this Court, or from any Circuit Court of the United States. And by another rule made at February Term, 1817, in all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this Court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this Court, or from any Circuit Court of the United States, under the direction of any Judge thereof. And no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories within twenty days from the service of such notice: provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open Court, in cases where, by law, it is admissible.

These rules conform to the proviso of the 30th section of the act of September 24, 1789, that nothing therein contained should be construed to prevent any Court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess. But the provisions of the preceding part of that section as to taking depositions *de bene esse* do not apply to cases pending in the Supreme Court, though

^(r) See Practice in Original Suits, *ante* 21.

^(s) Wheat. Dig. xiii.

such had been the practice. Testimony by depositions can be regularly taken for the Supreme Court, only under a commission issuing according to its rules.^(t) And such depositions are not, under any circumstances, to be considered as taken *de bene esse*, but are evidence in chief and absolutely, whether the witness reside beyond the process of the Court, or within it.^(u)

By the 30th section of the act of September 24th, 1789, the mode of proof by oral testimony, and examination of witnesses in open Court, shall be the same in all the Courts of the United States, as well in the trial of causes in equity, and of admiralty and maritime jurisdiction, as of actions at common law.

In an appeal from the Circuit Court, in an instance or revenue cause, which had been ordered to farther proof at a former Term, a witness being offered for the claimants to be examined *viva voce* the Court, for the sake of convenience, ordered his deposition to be taken in writing out of Court.^(x)

New evidence is admissible in instance or revenue causes which are pending in this Court on appeal, as well as in prize causes: and a commission may be obtained for that purpose.^(y) If the Court below should deny an order for farther proof, when it ought to be granted, or allow it improperly, and the objection be taken by the party, and appear upon the record, this Court, on appeal, can administer the proper relief. But, if such evidence appear on the record, without order or objection, it will be presumed to have been done by consent, and the irregularity is waved.^(z) And

(t) *The Argo*. 2 Wheat. 287. *The London Packet*. 2 Wheat. 172. See the 30th section, *post*. Circuit Court, Practice.

(u) *Sergeant v. Biddle*. 4 Wheat. 508.

(x) *The Samuel*. 3 Wheat. 77.

(y) *Brig James Wells*. 7 Cranch, 22. *The Clarissa Claiborne*, b. 107. *The Argo*. 2 Wheat. 289. note.

(z) *The Pizarro*. 2 Wheat. 227.

further proof will be extended to captors as well as claimants.(a)

An affidavit taken in the Court below, under an order for farther proof, not arriving till after condemnation, being attached to the record, was allowed to be read as evidence in this Court on appeal.(b)

On appeal, it is the practice of the Supreme Court to hear the cause, first on the evidence transmitted from the Circuit Court; and to decide on that, whether farther proof will be allowed. If such farther proof is allowed, an order is made.(c)

By a rule of the Supreme Court of February Term, 1817, whenever it shall be necessary or proper, in the opinion of the presiding Judge in any Circuit Court, or District Court, exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal, such presiding Judge may make such rule or order for the safe keeping, transporting, and return of such original papers, as to him may seem proper, and this Court will receive, and consider such original papers in connection with the transcript of the proceedings.(d)

As the Supreme Court in prize causes has only an appellate jurisdiction, a claim cannot be interposed there after appeal.(e) But if the Court below has proceeded to adjudication before the lapse of *a year and a day*, this Court will remand the cause, with directions to the Court below, to allow a claim to be filed, and the libel to be amended.(f)

Where merits clearly appear on the record, it is the settled practice of the Supreme Court, in admi-

(a) The Grotius. 8 Cranch, 356. 9 Cranch, 368.

(b) The London Packet. 2 Wheat. 372.

(c) Ib.

(d) 2 Wheat. vii.

(e) Ship Societe. 9 Cranch, 209. The Harrison, 1 Wheat. 298.

(f) The Harrison. 1 Wheat. 298.

ralty proceedings, not to dismiss the libel for irregularity in stating the ground of proceeding, but to allow the party to assert his rights by a new allegation: and for this purpose it will remand the cause to the Circuit Court, with directions to allow an amendment.(g)

As to damages and costs, the Court are not bound to adjudge damages for delay in all cases.(h) For, where the decree of the Circuit Court in a prize cause was affirmed, the Court, under the circumstances, refused to increase the damages, the prize having been sold by the agreement of the parties, and the money afterwards stopped in the hands of the marshal by a third person, the original owner of the prize, and they allowed interest only on the debt and not on the damages.(i) So, the damages may be decreased on affirmance, to the benefit of the plaintiff in error.(k) But, it seems, that the facts regulating the increase or decrease of the damages must arise and appear upon the record.(l) Thus where the Circuit Court, on affirming the decree of the District Court, in an admiralty cause, in favour of the libellant, decreed that the defendants should pay all expenses, the Supreme Court would not admit a certificate of respectable citizens of the amount of the damages, nor would they interfere to suggest a mode of assessing them: they allow no damages but for delay.(m) They gave, in that case, as damages, eight per cent. on the amount of sales from the time of the decree of the Circuit Court, and ordered the plaintiff in error to pay the costs accrued since the decree had been affirmed by the Supreme

(g) *The Schooner Adeline*. 9 Cranch, 244. *The Caroline*. 7 Cranch, 496. *The Edward*. 1 Wheat. 261. *The Divina Pastora*. 4 Wheat. 52.

(h) See Writ of Error. Practice, *post*.

(i) *Jennings v. The Perseverance*. 3 Dall. 336.

(k) *Penhallow v. Doane*. 3 Dall. 304, note. 1 Dall. 54.

(l) *Cotton v. Wallace*. 3 Dall. 304, note.

(m) *Ib.* 3 Dall. 302.

Court at a former Term, subject to the opinion of the Court on the question of damages.(*n*)

The allowance of counsel fees, as part of the damages given by the inferior Court, in their decree, will not be permitted in this Court, if it appear by the record:(*o*) but if such allowance do not appear by the record, the Court will not notice it.(*p*)

The costs of a case printed for the use of the Court, will not be allowed in affirming a decree, by way of damages for delay. However convenient it might be, no law allows it.(*q*)

By rule of Court of February Term, 1810,(*r*) upon the reversal of a judgment or decree of the Circuit Court, the party in whose favour the reversal is, shall recover his costs in the Circuit Court.

(*n*) Cotton v. Wallace. 3 Dall. 302.

(*o*) Arcambel v. Wilson. 3 Dall. 306.

(*p*) Jennings v. The Brig Perseverance. 3 Dall. 336.

(*q*) Ib.

(*r*) Wheat. Dig. xiii.

CHAPTER VII.

SUPREME COURT—WRITS OF ERROR TO STATE COURTS.

THE 3d article of the Constitution, (sec. 2. 1.) declares, that the *judicial power* of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority. And the same article, (sec. 2. 2.) after declaring in what cases the Supreme Court shall have original jurisdiction, provides, that in the above mentioned cases, among the others enumerated to which the judicial power of the United States extends, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress may make. As, under this latter provision, the appellate jurisdiction of the Supreme Court is dependent on the acts of Congress, (a) it can be exercised only in the manner prescribed by them: and all that Congress has thought it necessary to do in cases arising in the State Courts, under the Constitution, laws, and treaties of the United States, has been, to provide in certain cases an appeal by writ of error to the Supreme Court, from the decisions of the highest Courts of the States, in which a decision could be had. (b)

The 25th section of the act of September 24th,
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(a) *Durousseau v. The Bank of the United States.* 6 Cranch, 307. *United States v. More.* 3 Cranch, 159. See *ante.* 25.

(b) *M'Intire v. Wood.* 7 Cranch, 504.

1789, accordingly enacts, that a final judgment or decree, in any suit in the highest Court of law or equity of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the Chief Justice, or Judge, or Chancellor of the Court rendering or passing the judgment or decree complained of, or by a Justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a Circuit Court; and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity, or construc-

tion of the said Constitution, treaties, statutes, commissions, or authorities in dispute.

The sum or value of the matter in dispute is not material in a writ of error to a State Court.

The act of Congress does not prescribe the tribunal to which the writ of error must be directed: it may therefore be directed to any Court of the State, in which the record and judgment of the highest Court of that State may be found. If the highest Court has, according to the law and practice of the State, after giving a judgment, remitted the record and its judgment to the inferior Court whence it came, before receiving a writ of error from the Supreme Court of the United States directed to them, they cannot execute such writ, as they have parted with the record. To remove the judgment in such case, the writ of error must be directed to the Court to which the record is remitted, unless the objection to the direction of the writ of error be waved by consent.^(c)

As to what constitutes the highest Court of a State in which a decision could be had, it has been held, that if the decision was had in the superior judicature of a State, it is considered such a decision, notwithstanding the Legislature might, by the law and practice of that State, on petition of the party failing, re-hear the cause, and set aside the decision, but could not make a new decision.^(d) And so also it seems, a decision by a Court of Hustings of a borough which had refused an appeal to a higher State Court, on the ground, that the case was not subject to revision in any other Court of the State, is a judgment in the highest Court of such State in which a decision in the suit could be had, and may be removed to the Supreme Court of the United States by writ of error.^(e)

(c) *Gelston v. Hoyt*. 3 Wheat. 246.

(d) *Olney v. Arnold*. 3 Dall. 308.

(e) *Cohens v. Virginia*. 6 Wheat. 264. 290. 376.

But such judgment of the highest Court of a State must be final. For, where there had been in the inferior Court of the State, judgment for the plaintiff, and the highest Court of the State, on a bill of exceptions, reversed that judgment and remanded the cause to the inferior Court, with directions to award a *venire facias de novo*, the writ of error from the Supreme Court of the United States to such highest Court on their judgment of reversal, was dismissed.(f)

If, on a writ of error to the judgment of a State Court, the Supreme Court reverses such judgment, and issues a mandate, directing the State Court to carry into effect the judgment of the Supreme Court, and the State Court gives an opinion declining to obey the mandate, on the ground that the Supreme Court had not jurisdiction, and that the act of Congress allowing a writ of error from the Supreme Court of the United States to State Courts was unconstitutional, such opinion is a final judgment on which the party may have another writ of error, and the former record is not then before the Court.(g) But whether the Supreme Court has authority to issue a writ of mandamus to the State Court, in such case, to enforce the former judgment, *query*.(h)

To entitle a party to his writ of error from the Supreme Court, on the ground of the case being one that arises under a law of the United States, the decision of the highest State Court must be *against* the privilege claimed under such law, treaty, &c. For, if the defendants in a suit in the State Court, apply to it for a removal of the cause to the Circuit Court of the United States, on the ground of their being aliens, and the Court grant the removal, the plaintiffs cannot avail themselves of a writ of error from the Supreme Court

(f) *Houston v. Moore.* 3 Wheat. 433.

(g) *Martin v. Hunter's lessee.* 1 Wheat. 304.

(h) *Martin v. Hunter's lessee.* 1 Wheat. 362.

to remove such decision; for the decision is not against the privilege claimed, but in favour of it.⁽ⁱ⁾ So, where in ejectment neither side claims under a treaty, nor is affected by it, but the defendant sets up an outstanding title in a third person, which he contends is protected by treaty, and therefore the title is not in the plaintiff, and the highest Court of the State decide against such title, it is not a case in which a writ of error lies from the Supreme Court of the United States; for, though the words of the act of Congress extend the jurisdiction of the Supreme Court to cases where is drawn in question the construction of a treaty, and the decision is against the title, right, privilege, &c., these words must be restrained by the Constitution, which is confined (art. iii. sec. 2. 1.) to cases arising *under* treaties, &c.^(k)

The only title asserted by the defendants in error, (plaintiffs below in a bill in equity,) to the land in dispute, was founded on an alleged confiscation of it by the State of Maryland, and a conveyance by the State to them. The title set up by the plaintiffs in error, and the only one that could resist that claimed by the grantees of the State, was under the treaty of peace of September 6th, 1783, the 6th article of which, they contended, protected their rights, if the confiscation by the laws of the State was not complete prior to the treaty. The Court below decided, that the confiscation was complete, and that the treaty did not operate upon it: and they declared, and it was admitted by the parties, that when the confiscation is not complete before the treaty, the estate is protected by the treaty. It was held, that the Supreme Court of the United States had jurisdiction by writ of error, as the point to be decided was, whether this was a case of confisca-

(i) *Gordon v. Caldcleugh*. 3 Cranch, 268.

(k) *Owings v. Norwood*. 5 Cranch, 344. See 6 Wheat. 379.

cation within the meaning of the 6th article of the treaty, and involved the construction of that treaty, as well as the defendants' title under the State laws.^(l) And this Court is not confined to the abstract enquiry into the correctness of the construction put upon a treaty by the Court below; nor need it appear that they have given any construction to it. It is sufficient if it appear, that a title was set up under it, and that a decision took place against the title so set up, although there might be other grounds on which the decision was had against the title.^(m)

But if there be various grounds of claim stated in the Court below by bill in equity, some of which are dependent on acts of Congress, and others consist of matters of fraud or contract, and the Court below decide against them all, and dismiss the bill, this Court, on the writ of error, will take into consideration only such grounds of claim as arise under the acts of Congress, and examine how far the Court below decided right as respects them; it will not look into circumstances of alleged fraud or contract, unless they had induced the Court below to determine against the person having the title under the laws of the United States. The opinion of the State Court on the fraud or contract is conclusive, and the only question to be discussed here, is the title of the plaintiff under the acts of Congress.⁽ⁿ⁾

If two citizens of the same State, in a suit in the highest State Court, claim under the same acts of Congress, the Supreme Court of the United States has jurisdiction by writ of error to remove the decision below. The object of the Constitution and acts of Con-

(l) *Smith v. Maryland for the use of Carroll et al.* 6 Cranch, 286.

(m) *Martin v. Hunter's Lessee.* 1 Wheat. 304.

(n) *Matthews v. Zane.* 7 Wheat. 164. 206. See *Miller v. Nichols.* 4 Wheat. 311.

gress is not merely to maintain the authority of the Constitution and laws of the United States in cases arising under them, but to give the Supreme Court power to render uniform the construction of the laws of the United States, and the decisions upon rights or titles under those laws.(o)

If a State Court, on a motion for a mandamus to an officer of the United States, to do an act from which a party claims a benefit by virtue of a law of the United States, sustain the jurisdiction to issue such writ, the controlling power of this Court may be exercised under the description of an exemption claimed by the officer over whom the jurisdiction is exercised: and though the State Court after a hearing dismiss the claim on the merits, yet this Court, it seems, on a writ of error brought by the plaintiff, will affirm the judgment with costs, and declare as the reason thereof, that the Court below had no authority to issue a mandamus in the case.(p)

But it must appear from the record, that an act of Congress, the constitutionality of a State law, &c., were applicable to the case. This need not be stated in terms, but it must appear on the record.(q) Thus where in a case removed by writ of error from the highest Court of a State, the act of Congress supposed to have been disregarded, was, that giving the United States priority in cases of insolvency, and a claim by the District Attorney on behalf of the United States under that act appeared on the record, but the fact of insolvency did not appear on the record, it was held, that had that appeared, it would have been sufficient: but as it did not appear, and no other question was presented than the correctness of the decision ac-

(o) *Ib.* 4 Cranch, 382. 5 Cranch, 92.

(p) *McClung v. Silliman.* 6 Wheat. 598.

(q) *Martin v. Hunter's Lessee.* 1 Wheat. 304. *Inglee v. Coolidge.* 2 Wheat. 363.

cording to the State laws, that was a question over which this Court had no jurisdiction, and the writ of error was dismissed.^(r) The report of the Judge who tried the cause, containing a statement of the facts on which the Court below in its discretion might grant relief or a new trial, cannot be received to shew the question raised in the cause, though annexed to the return of the writ of error. It is not like a special verdict, or statement of facts agreed of record, upon which judgment is to be pronounced, and therefore the verdict being general, and the question raised appearing only by the report of the Judge to be respecting an act of Congress, the writ of error was dismissed.^(s)

The appellate jurisdiction from the highest State Courts by writ of error under the act of September 24th, 1789, was exercised by the Supreme Court in a variety of cases without question, until the year 1815, when, on the reversal by the Supreme Court of the judgment of the Court of Appeals of the State of Virginia, and mandate issued, that Court gave an opinion, that the Constitution did not warrant the vesting in the Supreme Court of the United States an appellate jurisdiction from the judgments of State Courts, and declined obedience to the mandate.^(t) But on a new writ of error, the Supreme Court held, that the jurisdiction was constitutionally vested in them by the act of September 24th, 1789.^(u) In the celebrated case of *Cohens v. Virginia*,^(x) in 1821, this point was again raised and decided in the same manner, and it was also determined, that the Supreme Court had such appellate jurisdiction, though one of the parties was a

^(r) *Miller v. Nichols*. 4 Wheat. 311.

^(s) *Inglee v. Coolidge*. 2 Wheat. 363. See *Lanusse v. Barker*. 3 Wheat. 101.

^(t) Cited 6 Wheat. 352. note *a*.

^(u) *Martin v. Hunter's Lessee*. 1 Wheat. 304.

^(x) 6 Wheat. 264.

State, and the other a citizen of that State ; and whoever might be the parties.

An act of Congress for the regulation of the local affairs of the District of Columbia, is a law of the United States under the 25th sec. of the act of September 24th, 1789. And so, it seems, is any act passed by Congress by virtue of the power to exercise exclusive legislation, given by the 8th sec. of the 1st article of the Constitution. And a case in which the validity of such act, or of a State law as repugnant to such act, is drawn in question, if decided by the highest State Court against the validity of such act of Congress, or in favour of the validity of such law, is the subject of a writ of error. So also is it, if the question be, whether Congress, in passing such act intended to legislate beyond the district of Columbia; for such point involves the question, whether the act, if intended so to operate, is warranted by the Constitution.(y) So, if this Court reverse the judgment of the highest State Court, and issue a mandate, which the State Court declines to obey, on the ground that the act of Congress of September 24th, 1789, vesting this Court with appellate jurisdiction from State Courts, is unconstitutional and void, such opinion is a denial of the validity of a Statute of the United States, and error lies upon it from this Court.(z) And on such writ of error, the former record is not before the Court, but only the judgment and proceedings in the State Court subsequent to the mandate.(a) In the important case however of *Martin v. Hunter's Lessee*,(b) from motives of a public nature, the Court went back to the former record, and re-examined the question of its jurisdic-

y) *Cohens v. Virginia*. 6 Wheat. 264.

(z) *Martin v. Hunter's lessee*. 1 Wheat. 304.

(a) *Ib.* See also *Browder v. M^rArthur*. 7 Wheat. 58.

(b) 1 Wheat. 355.

tion, as it stood upon the record formerly in judgment.

A writ of error lies from the Supreme Court of the United States to remove a judgment rendered in the highest State Court against the defendant, on an information brought by the attorney for the State, to recover a fine imposed by the State law for the use of the State.(c) And, it seems, the right to issue such writ of error extends under the act of September 24th. 1789, to criminal cases.(d)

It seems to be the general opinion, that, from a decision by a State Court or Judge on a *habeas corpus*, in a case arising under the Constitution, laws, or treaties of the United States, no appeal or writ of error lies to the Supreme Court of the United States under the present provision of the acts of Congress. Yet it seems, the subject is within the power of Congress, and they might enact regulations providing for the exercise of the appellate power of the Supreme Court in such cases.(e)

(c) *Cohens v. Virginia*. 6 Wheat. 264.

(d) *Cohens v. Virginia*. 6 Wheat. 387. See *Martin v. Hunter's lessee*. 1 Wheat. 377. *United States v. More*. 3 Cranch. 159.

(e) *Case of Lockington*. 5 Hall's Law Journ. 96.

CHAPTER VIII.

SUPREME COURT—OPINIONS OPPOSED IN THE CIRCUIT COURT.

ANOTHER mode, in which a case may be removed from the Circuit to the Supreme Court is, by a certificate that the opinions of the Judges of the Circuit Court are opposed, returned agreeably to the 6th sec. of the act of 29th April, 1802.

Previous to the act of 29th April, 1802, the Circuit Courts were composed of three Judges: and the two Judges of the Supreme Court, who composed it with the district Judge, changed their circuits. But under this act, the Judge of the Supreme Court that attends it is stationary, and the Court being always composed of the same Judges, any division of opinion would leave the question undetermined. To remedy this inconvenience, the 6th sec. provides, that whenever any question shall occur before a Circuit Court upon which the opinions of the Judges shall be opposed, the point upon which the disagreement shall happen shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the Judges, and certified under the seal of the Court to the Supreme Court, at their next session to be held thereafter, and shall by the said Court be finally decided. And the decision of the Supreme Court, and their order in the premises shall be remitted to the Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order. *Provided*, that nothing herein contained, shall prevent the cause from proceeding,

if, in the opinion of the Court, farther proceedings can be had, without prejudice to the merits. And *provided* also, that imprisonment shall not be allowed, nor punishment in any case be inflicted, where the Judges of the said Court are divided in opinion upon the question touching the said imprisonment or punishment.(a)

The provisions of this act extend to criminal as well as civil cases.

If a case comes up in error in consequence of the opposition in opinion of the Judges of the Circuit Court, the Supreme Court will consider only the single question or questions upon which the Judges were opposed, and not the whole case: but the parties are not thereby precluded from bringing a writ of error on the final judgment below.(b)

But a suit cannot be removed in this manner, which has been brought from the District to the Circuit Court by writ of error: for the district Judge could not sit in the Circuit Court on a writ of error from his own decision, and consequently there could be no opposition of opinion to be certified to the Supreme Court.(c) Nor can a division of opinion on a motion for a new trial in any case, whether civil or criminal, be removed in this manner.(d)

Where the opinions of the Judges are opposed, they do not assign any reasons in favour of their respective opinions, but merely state the point of disagreement, in order that either party may carry it to the Supreme Court for ultimate decision.(e)

(a) See *United States v. Worrall*. 2 Dall. 384. *United States v. Williams*. 4 Hall's Law Journ. 461, where this happened under the former system.

(b) *Ogle v. Lee*. 2 Cranch, 33.

(c) *United States v. Lancaster*. 5 Wheat. 434.

(d) *United States v. Daniel*. 6 Wheat. 542.

(e) *United States v. Smith and Ogden*, 89, per. Paterson, J.

CHAPTER IX.

SUPREME COURT—APPELLATE POWER—HABEAS
CORPUS, &c.

OTHER modes in which the Supreme Court exercises its appellate power are *habeas corpus*, prohibition, *mandamus*, &c. By the 14th section of the act of September 24, 1789, all the Courts of the United States have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the Justices of the Supreme Court, as well as Judges of the District Court, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment; *provided* that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under, or by colour of the authority of the United States, or are committed for trial before some Court of the same, or are necessary to be brought into Court to testify.

Whether the Supreme Court had power to issue a *habeas corpus* to inquire into the cause of commitment of a person in custody under a commitment of the Circuit Court of the District of Columbia was a question that arose in the case of Bollman and Swartwout, who were committed by that Court on a charge of treason.^(a) The principal objections made to it were, that the act of Congress confined that power to

(a) 4 Cranch, 75.

a single Judge of the Supreme or District Court, and that it was the exercise of an original jurisdiction in a case in which it was not granted by the Constitution. But the Court decided, on a comparison of the above sections with the 33d section of the act of September 24, 1789, which authorizes the Supreme Court to admit to bail in criminal cases, that it had the power, and that the jurisdiction exercised by *habeas corpus* in such case is not original, but appellate. It is the revision of a decision of an inferior Court, by which a citizen has been committed to gaol. It does not touch the question of guilt, but of imprisonment, and they awarded the writ. CUSHING and JOHNSON J. dissented, on the latter ground. Prior to this case the Supreme Court had exercised a similar jurisdiction, without objection, in Hamilton's case,^(b) where the commitment was by the District Judge, and in Burford's case.^(c) In a late case where the question was again made, whether this Court had authority to issue a *habeas corpus* where a person was in gaol under the warrant or order of any other Court of the United States, the Court declared that the point had already passed *in rem judicatam* in this Court: that in the case of *Bollman v. Swartwout*, it was expressly decided, upon full argument, that this Court possessed such an authority, and the question had ever since been considered at rest.^(d)

But the Supreme Court will not grant a *habeas corpus*, to bring up a person who is in the custody of the Marshal under a commitment of a Circuit Court of the United States for a contempt: nor, if granted, will it inquire whether the Court erred in its judgment of the law applicable to the case, if there be no question but that such commitment was made by a Court of competent jurisdiction, and in the ex-

(b) 3 Dall. 17.

(c) 3 Cranch, 448.

(d) Ex parte Kearney. 7 Wheat. 41, 42.

ercise of an unquestionable authority. The adjudication of the Court below is a conviction, and is conclusive, and the commitment in consequence is an execution ; and the exercise of the power of revising the case on a *habeas corpus*, would be the exercise of an appellate jurisdiction in criminal cases, which is an authority not granted by the laws of the United States, except by a certificate that the opinions of the Judges are opposed ; and the Court will not do indirectly, what they cannot do directly. Where, therefore, the party was in gaol, in custody of the Marshal, under a commitment of the Circuit Court for the District of Columbia, for an alleged contempt in refusing to answer a question put to him as a witness, on the trial of an indictment, the Supreme Court refused to grant a *habeas corpus* to bring up his body.(e)

The Supreme Court has power to issue not only this writ of *habeas corpus ad subjiciendum*, to inquire into the cause of commitment, but also the *habeas corpus ad prosequendum, testificandum et deliberandum*.(f) But the acts of Congress do not extend to it the writ of *habeas corpus ad respondendum*, nor *ad satisfaciendum*, as they are not processes necessary for the exercise of the jurisdiction of the Supreme Court ; nor the writ of *habeas corpus ad faciendum et recipiendum*, commonly denominated a *habeas corpus cum causa*, a different mode of bringing up suits from the Courts below being provided by the acts of Congress.(g)

On the return of the *habeas corpus*, if the Court go into an examination of the evidence upon which the commitment was grounded, it is unimportant whether the commitment be regular in point of form or not : the Court will proceed to do what the Court below

(e) *Ex parte Kearney*. 7 Wheat. 38. See also *Anderson v. Dunn*. 6 Wheat. 204.

(f) 3 Cranch, 448.

(g) *Ib.*

ought to have done.(h) So, if a certificate from the secretary of state of the United States of the appointment of certain magistrates, before whom affidavits were made, on which the commitments were founded, be informal, and may readily be corrected, the Court will proceed to consider the subject as if the certificate were corrected, retaining however any final decision, if against the prisoners, until the correction shall be made.(i)

The question to be determined on a *habeas corpus* for the purpose of inquiring into the cause of commitment is, whether the accused shall be discharged, or held to trial: and if the latter, in what place the trial shall take place, and whether the accused shall be confined, or admitted to bail. If upon this inquiry it manifestly appears, that no crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.(k) The majority of the Court, therefore, being of opinion, that there was not sufficient evidence against the accused of the fact of their levying war against the United States to justify their commitment on the charge of treason, discharged them: being divided in opinion as to their having committed an offence of another description.(l)

The limitation in the first clause of the 14th section above mentioned, that the writs shall be agreeable to the principles and usages of law, means those general principles and those general usages which are to be found, not in the legislative acts of any particular State, but in that generally recognised and long esta-

(h) *Ex parte Bollman and Swartwout.* 3 Cranch, 114.

(i) *Ib.* 130.

(k) See *Commitment. post.*

(l) *Ex parte Bollman and Swartwout.* 3 Cranch, 75.

lished law, which forms the substratum of the laws of every State.(m)

On *habeas corpus* for a prisoner a *certiorari* may issue from the Supreme Court to the clerk of the Circuit Court, to certify the record by which the cause of commitment may be examined, and its legality investigated.(n)

The 13th section of the act of September 24, 1789, also vests in the Supreme Court power to issue writs of *prohibition* to the District Courts when proceeding as Courts of admiralty and maritime jurisdiction. And such prohibition lies to the District Court to stay proceedings before sentence, when that Court entertains a jurisdiction not granted by the law of nations, or Constitution, or laws of the United States.(o) And such proceeding in prohibition, or other similar writ, is appellate in its nature.(p)

By the 13th section of the act of September 24, 1789, it is further provided, that the Supreme Court shall have power to issue writs of mandamus, in cases warranted by the principles and usages of law, to any Courts appointed, or persons holding office under the authority of the United States.

The issuing of a mandamus to Courts, is the exercise of an appellate jurisdiction, and therefore constitutionally vested by this act in the Supreme Court; but a mandamus directed to a public officer belongs to original jurisdiction, and by the Constitution, the exercise of original jurisdiction by the Supreme Court is restricted to certain specified cases, which do not comprehend a mandamus. The latter clause of the above section, therefore, authorising this writ to be

(m) *United States v. Burr*, appendix, 2d part, 185, 6. Per Marshall C. J.

(n) *Ex parte Burford*. 3 Cranch, 448.

(o) *United States v. Peters*. 3 Dall. 121.

(p) *Cohens v. Virginia*. 6 Wheat. 397.

issued by the Supreme Court, to persons holding office under the authority of the United States, is not warranted by the Constitution, and is void, and the Court will not enforce it. The Court, therefore, refused to issue a mandamus to the secretary of state of the United States, commanding him to deliver to the relator a commission of justice of the peace for the district of Columbia, which had been signed by the President of the United States, and sealed with the great seal.(q)

A mandamus will not be granted to a district judge, commanding him to issue a warrant in a case in which he acts in a judicial capacity in the matter, and has determined against issuing it. The Court has no power to compel a Judge to act according to the dictates of any judgment but his own.(r)

Where the Court below stayed proceedings in a suit, upon a suggestion of the district attorney of the United States, it seems, a mandamus *nisi*, in nature of a *procedendo*, is the proper remedy.(s)

The Supreme Court was divided in opinion on the question, whether the attorney general of the United States has a right *ex officio*, to apply for a mandamus to the judges of the Circuit Court, commanding them to proceed to execute certain duties imposed on them by an act of Congress relating to invalid pensioners, which they had declined executing.(t)

The Supreme Court cannot remove a cause from the Circuit Court by *certiorari*, on the allegation that the Circuit Court has no jurisdiction of the case, but that the jurisdiction over it belongs to the Supreme Court; the mode of removal is different by the law.(u)

(q) *Marbury v. Madison*. 1 Cranch, 175.

(r) *United States v. Lawrence*. 3 Dall. 42.

(s) *Livingston v. Dorgenois*. 7 Cranch, 577.

(t) *Hayburn's Case*. 2 Dall. 409.

(u) *Fowler v. Lindsey*. 3 Dall. 411.

Nor, it seems, does a *certiorari* lie in such case, to change the *venue*, and grant an impartial trial.(x)

A *certiorari* issues on an allegation of diminution,(y) or, where that will not answer, the Court will direct a special *certiorari* to be framed, suited to the case.(z)

In some one or other of these modes, must a cause be brought before the Supreme Court; for it will not take cognisance of a cause not regularly brought before it. As where a suit was depending in a Circuit Court, and the attornies stated a case, and presented it to the Supreme Court for consideration and decision, the Court refused to consider and decide it.(a)

(x) *Fowler v. Lindsey*. 3 Dall. 411.

(y) *Ex parte Burford*. 3 Cranch, 448.

(z) *Barton v. Pettit*. 7 Cranch, 288.

(a) *Dewhurst v. Coulthard*. 3 Dall. 409. See also *Lanusse v. Barker*. 3 Wheat. 101. And *United States v. Tenbrock*. 2 Wheat. 248.

CHAPTER X.

SUPREME COURT—WRIT OF ERROR—PRACTICE.

THE Practice of the Supreme Court on Writs of Error, will be considered under different heads.

1. As to the power to issue writs, forms, and style of process, general rules of practice, regulations as to attornies and counsellors, &c. See Supreme Court—Practice in Original Suits, *ante*. 19.

2. Whence the writ of error issues.

It was determined by the Supreme Court, in the year 1791, that writs of error could regularly issue only from the office of the clerk of the Supreme Court.^(a) The inconvenience of such a rule occasioned the provision of the act of Congress of May 8th, 1792, sect. 9, that it should be the duty of the clerk of the Supreme Court of the United States, forthwith to transmit to the clerks of the several Circuit Courts, the form of a writ of error, to be approved of by any two of the Judges of the Supreme Court, and it should be lawful for the clerks of the said Circuit Courts to issue writs of error agreeably to such forms, as nearly as the case may admit, under the seal of the said Circuit Courts, returnable to the Supreme Court, in the same manner as the clerk of the Supreme Court may issue such writs in pursuance of the act of 24th September, 1789.

(a) West v. Barnes. 2 Dall. 401.

3. Of the teste of the writ.

A writ of error ought to bear teste of the term next preceding that to which it is returnable, and a term must not intervene between the teste and return.(b) But a writ of error issued in September, may bear teste of the preceding February Term of the Court, and may be returnable to the next February Term, notwithstanding the intervention of the August term,(c) and if the writ of error was in fact issued after the term preceding that to which it is returnable, it is not a sufficient objection that it is not tested of the last day of such preceding term, nor of that term at all, for the teste is amendable by the record of the Court shewing the duration of the term.(d)

4. Of the citation.

The 22d section of the act of September 24th, 1789, requires, that there shall be annexed to, and returned with the writ of error, among other things, a citation to the adverse party, signed by a Judge of the Circuit Court to which the writ issued, or Justice of the Supreme Court, the adverse party having at least thirty days' notice, and every Justice or Judge, signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.

By section 23, a writ of error, as aforesaid, shall be a *supersedeas*, and stay execution, in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's of-

(b) *Hamilton v. Moore.* 3 Dall. 371.

(c) *Blackwell v. Patten.* 7 Cranch, 277.

(d) *Course v. Stead.* 4 Dall. 25.

fice, where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of: until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a *supersedeas*.

The act of December 12, 1794, sect. 1, reciting that doubts had arisen as to the extent of the security to be required in certain cases, provides, in sect. 2, that the security to be required and taken on the signing of a citation, on any writ of error which shall not be a *supersedeas*, and stay execution, shall be only to such amount as, in the opinion of the Justice or Judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment, or decree, may be adjudged or decreed to the respondent in error.

Although it does not appear before the Supreme Court on the record returned with the writ of error, that the Judge who granted the writ of error did, upon issuing the citation, take the security required by the 22d section of the act of September 24th, 1789, yet that does not avoid the writ of error. This provision is merely directory, and the presumption is, that it has been complied with. The statute does not require the security to be returned to the Supreme Court, and it might, with equal propriety, be lodged in the Court below. If any prejudice happen by the omission, the Supreme Court can grant summary relief, by imposing terms on the other party.(e)

The original citation, signed by the Judge himself, must be returned with the record; a copy, with an affidavit of service on the defendant in error, is not sufficient.(f) If there be no original citation returned, the writ of error will be quashed,(g) or dismiss-

(e) *Martin v. Hunter's lessee*. 1 Wheat. 361.

(f) *Wilson v. Daniel*. 3 Dall. 401.

(g) *Lloyd v. Alexander*. 1 Cranch, 365.

ed.(h) But if it be suggested that the citation has been served, but not returned by the clerk below, with the writ of error, a *certiorari* will be granted,(i) which it seems the clerk below may return, under his hand and the seal of the Court, by virtue of the rule of Court.(k)

A citation not served, is as no citation.(l) If the feme plaintiff below, intermarry after the judgment, the citation may be served on her husband.(m)

If the citation has not been served thirty days before the first day of the term, the Court will not take up the cause until thirty days have expired from the time of such service, though the parties appear.(n) Nor will the Court, in such case, even after the expiration of the thirty days, take up the cause at that term without consent.(o)

5. Of the service.

Under the 23d section of the act of September 24th, 1789, a writ of error is a *supersedeas*, and stays execution, in cases only where it is served, by a copy thereof, for the adverse party being lodged in the office of the clerk of the Court, where the judgment was rendered, or decree was passed within ten days, Sundays exclusive, after the rendering of the judgment or passing the decree complained of.(p) Such lodging of a copy is a service of the writ, and if not made till after the return day of the writ, it is void: but if the service is made before the return day, it is

(h) *Bailiff v. Tipping*. 2 Cranch, 406.

(i) *Field v. Milton*. 3 Cranch, 514.

(k) *Fennemore v. The United States*. 3 Dall. 360, note.

(l) *Lloyd v. Alexander*. 1 Cranch, 365.

(m) *Fairfax's executor v. Fairfax*. 5 Cranch, 21.

(n) *Lloyd v. Alexander*. 1 Cranch, 365.

(o) *Welsh v. Mandeville*. 5 Cranch, 321.

(p) *Wood v. Lide*. 4 Cranch, 181.

good, though the writ be not returned till after the Court has closed its session; provided the opposite party appear: for such appearance waves all objection to the irregularity of the return.(q) In *Blair v. Miller*,(r) it was held that a writ of error is a nullity, if not returned till the term next succeeding that to which it was returnable: but it does not appear which party made the objection, in that case, to the writ, nor whether there was any appearance for the opposite party.(s) The writ of error may, it seems, be taken out and served before the judgment below is signed.

Where the value does not appear on the record, and time is given to the plaintiff in error, defendant below, to prove it by affidavits, the writ of error is not a *supersedeas*.(t)

6. Of the return, assignment of errors, and plea.

By the 22d section of the act of September 24th, 1789, to the writ of error must be annexed and returned therewith, at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed as therein directed. We have already treated of the return of the citation,(u) and of the writ.(x) By rule of Court, (y) the clerk of the Court to which any writ of error

(q) *Wood v. Lide*. 4 Cranch, 181.

(r) 4 Dall. 21.

(s) *Wood v. Lide*. 4 Cranch, 181. In *Blair v. Miller*, it seems the writ was not returned till the term succeeding that to which it was returnable: in *Wood v. Lide*, it was returned shortly after the Court had closed the February session, to which it was returnable, viz. on the 18th March. See *Hamilton v. Moore*. 3 Dall. 371.

(t) *Williamson v. Kincaid*. 4 Dall. 20.

(u) *Ante*. Citation.

(x) *Ante*. Service.

(y) 1 Cranch, xvii.

is directed, may make return of the same, by transmitting a true copy of the record, and of all the proceedings in the cause, under his hand and the seal of the Court: and such return is valid.(z) But the return should, it seems, purport to be an entire copy: for a certificate of the clerk below, signed "Copy teste A. B., clerk," is a defective verification of the record.(a) And the clerk below may under this rule return a *certiorari*, issued after the return of the writ of error, on suggestion of diminution.(b) But if there be another record on which the judgment brought up by the writ of error is dependant, a *certiorari* in diminution will not answer to bring that up; the Court will therefore direct a special *certiorari* to be framed.(c)

The transcript of the record need not contain the names of the jurors who tried the cause, if complete in other respects.(d)

By a rule of Court of February Term, 1806,(e) all causes, the records in which shall be delivered to the clerk on or before the sixth day of a term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance. In all cases where a writ of error shall be a *supersedeas* to a judgment rendered in any Circuit Court of the United States, (except that for the District of Columbia,) at least thirty days previous to the commencement of any terms of this Court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of the Court, within the first six days of the term. And if he shall fail

(z) *Martin v. Hunter's lessee.* 1 Wheat. 361.

(a) *Wilson v. Daniel.* 5 Dall. 401.

(b) *Fennimore v. The United States.* 3 Dall. 360. note.

(c) *Barton v. Pettit.* 7 Cranch, 288.

(d) *Owens v. Hannay.* 9 Cranch, 180.

(e) 3 Cranch. 239.

so to do, the defendant in error shall be permitted afterwards to lodge a copy of the record with the clerk, and the cause shall stand for trial in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule is to apply to all judgments rendered by the Court for the District of Columbia, at any time prior to a session of this Court. But, though the transcript be not filed within the first six days of a term, agreeably to this rule, yet if it be filed during the term, before a motion is made to dismiss the writ of error, it is good.(f)

By a subsequent rule of Court made at February Term, 1821, *in all cases* where a writ of error or an appeal shall be brought to this Court, from any judgment or decree rendered thirty days before the Term, to which such writ of error or appeal shall be returnable, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this Court, within the first six days of the Term: on failure to do which, the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk, and thereupon the cause shall stand for trial in like manner as if the record had been duly filed within the first six days of the Term: or, at his option, he may have the cause docketed, and dismissed, upon producing a certificate from the clerk of the Court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed.(g)

(f) Bingham v. Morris. 7 Cranch, 99.

(g) 6 Wheat. vi.

In respect to the assignment of errors and plea, a rule of Court made at February Term, 1806, provides,^(h) that, in cases not put to issue at the August Term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the Court below, to assign them in this Court at the commencement of the Term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket. And if he shall fail to do so, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his cost: and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the Court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

In practice, a specific assignment of errors has never been insisted on as a preliminary to the argument or decision of the cause.⁽ⁱ⁾

7. Appearance.

By a rule of Court made at August Term, 1801,^(k) in every cause where the defendant in error fails to appear, the plaintiff may proceed *ex parte*,^(l) subject however, it would seem, to the rules afterwards made.^(m) By another rule, made at February Term, 1803,⁽ⁿ⁾ where the writ of error issues within thirty days before the meeting of the Court, the defendant is at liberty to enter his appearance, and proceed to trial; otherwise the cause must be continued. Where there is no appear-

^(h) 3 Cranch, 239.

⁽ⁱ⁾ *Green v. Watkins*. 6 Wheat. 263.

^(k) 1 Cranch, xviii. See *ante*, Service, &c.

^(l) See *Hazlehurst v. The United States*. 4 Dall. 6.

^(m) See *ante*. 78, 79.

⁽ⁿ⁾ 1 Cranch, xviii.

ance for the plaintiff in error, the defendant in error may have the plaintiff in error called, and dismiss the writ of error, or may open the record, and pray for an affirmance; and costs go of course.*(o)* If there is no appearance on the docket for either party, nor counsel appearing, the Court will order the parties to be called, and if neither appear, will dismiss the writ of error.*(p)* The effect of appearance in waving objections to the service of the citation, and the irregularity of the return of the writ, has been already noticed in treating of the citation and service.

8. Death of party.

If either party die pending the proceedings on the writ of error in the Supreme Court, the writ of error is not thereby abated, whether it be in a real or personal action, and, by the practice of the Court, whether there has been an assignment of errors or not.*(q)* The representatives in the personalty or realty may voluntarily become parties, or may be compelled to become parties agreeably to the following rule of Court, which was made in consequence of the above case.

This rule of Court was adopted at February Term, 1821, and provides, that whenever pending a writ of error or appeal in this Court, either party shall die, the proper representatives in the personalty or realty, of the deceased party, according to the nature of the case, may voluntarily come in, and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases: and if such representatives shall not voluntarily become parties, then the other party may

(o) *Montalet v. Murray.* 3 Cranch. 248. See *ante.* 77, 78.

(p) *Rodford v. Craig.* 5 Cranch, 289.

(q) *Green v. Watkins.* 6 Wheat. 260. See *Macker's heirs v. Thomas.* 7 Wheat. 530.

suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing Term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed: and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the same reversed if it be erroneous. *Provided*, however, that a copy of such order shall be printed in some newspaper at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the Term of the Supreme Court, then next ensuing.(r)

9. Argument.

By a rule of Court of February Term, 1795,(s) the Court gave notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case, from the counsel on each side of the cause. The Court expect them from both sides, and unless they are furnished the cause will be dismissed or continued.(t) And in one case the cause was dismissed, because the appellant had not furnished the points of the case, but was afterwards reinstated by consent.(u) By a rule made at February Term, 1821,(x) after that Term no cause standing for argument will be heard by the Court, until the parties shall have furnished the Court with a printed brief or abstract of the cause, containing the substance of all

(r) 6 Wheat. v.

(s) 1 Cranch, xviii.

(t) Peyton v. Brooke. 3 Cranch, 93.

(u) Schooner Catherine v. The United States. 7 Cranch, 99.

(x) 6 Wheat. v.

the material pleadings, facts, and documents, on which the parties rely, and the points of law and fact intended to be presented at the argument.(y)

By a rule of Court made at February Term, 1812,(z) only two counsel are permitted to argue for each party, plaintiff and defendant, in a cause: and the rule is inflexible, whatever may be the number of points or parties in a cause.(a) But it has been dispensed with in a cause of great public importance, where the sovereign rights of the United States and a State were involved, and the government of the United States directed the attorney general to appear for one of the parties.(b)

Where the counsel employed had died, shortly before the Term, and the cause was of magnitude, the Court granted a continuance.(c).

It seems, a cause may be re-heard during the Term at which it is decided, but not after.(d) At all events, it is too late to grant a re-hearing in a cause, after it has been remitted to the Court below, to carry into effect the decree of this Court, according to its mandate.(e)

10. Matters of form and amendments.

By the act of September 24th, 1789, sect. 32, no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any of the Courts of the United States, shall be abated, arrested, quashed, or reversed for any defect, or want of form, but the said Courts respectively shall proceed and give

(y) 6 Wheat. v.

(z) Wheat. Dig. xiii.

(a) 7 Cranch, 1.

(b) M'Culloch v. The State of Maryland. 4 Wheat. 322.

(c) Hunter v. Fairfax's lessee. 3 Dall. 306.

(d) Hudson v. Smith. 7 Cranch, 1.

(e) Browder v M'Arthur. 7 Wheat. 58.

judgment, according as the right of the case and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form, in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only, in cases of demurrer, which the party demurring shall specially set down and express, together with his demurrer, as the cause thereof. And the said Courts, respectively, shall and may, by virtue of the act, from time to time, amend all and every such imperfections, defects, and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process, or pleadings, upon such conditions as the said Courts, respectively, shall, in their discretion, and by their rules, prescribe.

The teste of a writ of error may be amended by the record of the duration of the term, where it bears teste after the rising of the Court, so as to make it during the term.*(f)* So, the return day may be amended by filling a blank, if the indorsements furnish something to amend by.*(g)* So, where the omission was merely clerical, as where the direction was to the Judges of the Circuit Court, holden in and for the district aforesaid, whereas no district was previously named, it was allowed to be amended.*(h)*

The Supreme Court, on reversal on a writ of error, do not give directions respecting amendments. but leave such questions to the Court below.*(i)* unless on appeal, in some cases of libel for a forfeiture.*(k)*

(f) *Course v. Stead.* 2 Dall. 22.

(g) *Mossman v. Higginson.* 4 Dall. 12.

(h) *Course v. Stead.* 2 Dall. 22.

(i) *Sheehy v. Mandeville.* 6 Cranch, 267. *Slacum v. Pomery.* Ib. 225.

(k) 7 Cranch, 496. 570. 9 Cranch, 244. 1 Wheat. 261. 4 Wheat. 52.

11. Judgment.

The act of September 24th, 1789, sect. 23, provides for damages and costs on affirmance.^(l) The 24th sect. enacts, that when a judgment or decree shall be reversed in a Circuit Court, such Court shall proceed to render such judgment, or pass such decree as the District Court should have rendered or passed, and the Supreme Court shall do the same on reversals therein; except when the reversal is in favour of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed are uncertain, in which case they shall remand the cause for a final decision.

If a judgment be reversed, which has been rendered on a special verdict or case agreed; the Court above will proceed to give judgment.^(m) But when a judgment is reversed on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the Court below,⁽ⁿ⁾ and the Supreme Court will direct it.^(o) So, if the judgment be reversed because the special verdict is defective.^(p) And if the judgment below was for the defendant in a special action of *assumpsit*, and it is reversed on a bill of exceptions, this Court will not assess the damages, and render judgment therefor in favour of the plaintiff, although the parties below, after verdict, agreed by a writing sent up with the record, that in the alternative of reversal, the Supreme Court should assess the damages, and enter judgment therefor.^(q)

If a case has been removed from the Circuit Court,

(l) See the next head, *post*.

(m) *Hudson v. Guestier*. 6 Cranch, 285, note.

(n) *Ib.* *Lanusse v. Barker*. 3 Wheat. 101.

(o) *Otis v. Walter*. 6 Wheat. 592.

(p) *Chesapeake Insurance Company v. Stark*. 6 Cranch, 268.
Livingston v. Maryland Insurance Company. 6 Cranch, 274.

(q) *Lanusse v. Barker*. 3 Wheat. 101.

and this Court decide on the merits, reverse the decree, and make a new decree, and issue its mandate requiring only the execution of its decree, the Circuit Court is bound to carry that decree into execution, and cannot entertain the question whether it has jurisdiction, although the jurisdiction of the Court do not appear in the proceedings.^(r)

If the Court below have issued an irregular writ of execution, this Court will not quash it, but will direct the Court below to quash it, and award restitution. But, it seems, a writ of error will not remove an execution awarded by a subsequent order of the Court below; such order should be brought up by writ of error.^(s)

The question before an Appellate Court is, whether the judgment was correct, not what was the ground on which the judgment professed to proceed. If, therefore, the judgment below, dismissing a motion for a *mandamus*, is correct in itself, but the motion was dismissed on the merits, that Court deciding that it had jurisdiction, and the Supreme Court is of opinion on a writ of error brought by the plaintiff, that the Court below had not jurisdiction, it will affirm the judgment with costs, and declare that as the reason.^(t)

If the judgment below, on demurrer, be for the defendant, and the Supreme Court reverse the judgment, if the plaintiff in error obtain judgment in the Court below, it will of course be with costs. So, in all cases of reversal, if this Court direct the Court below to enter judgment for the plaintiff in error, the Court below will, of course, enter the judgment with the costs of that Court.^(u)

^(r) Skillern's executors v. May's executors. 6 Cranch, 267.

^(s) Wallen v. Williams. 7 Cranch, 278.

^(t) M'Clung v. Silliman. 6 Wheat. 598.

^(u) M'Knight v. Craig's Administrators. 6 Cranch, 187. *Riddle v. Mandeville*. 6 Cranch, 86.

By sec. 24, of the act of 1789, the Supreme Court shall not issue execution in cases that are removed before them by writ of error, but shall send a special mandate to the Circuit Court to award execution. This is now the case in appeals also.

12. Damages and costs.

The 23d section of the act of September 24th, 1789, declares, that where upon the writ of error the Supreme Court shall affirm a judgment, they shall adjudge to the respondent in error just damages for his delay, and single or double costs, at their discretion. These words, "at their discretion," apply as well to the damages as to the costs, and the Court is not bound in all cases to adjudge damages for delay.(x) It is provided by a rule of Court adopted at February Term, 1803,(y) that in all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per cent. per annum, on the amount of the judgment. But in such cases, where there exists a real controversy, the damages shall be only at the rate of six per cent. per annum. In both cases the interest is to be computed as part of the damages. On affirming the judgment of the Circuit Court, this Court calculates interest on the aggregate of principal and interest, up to the time of affirmance;(z) but they will not calculate interest up to the time when their man-

(x) *Jennings v. The Perseverance*. 3 Dall. 336. See Appeal and Judgment, *ante*.

(y) 1 Cranch, xviii.

(z) By a general rule, made at February Term, 1807, where damages are given by the rule passed in February, 1803, the said damages shall be calculated to the day of affirmance of the said judgment in the Circuit Court. 4 Cranch. *Ad finem*.

date is to operate, because the party may pay the money immediately.(a)

The 4th sect. of the act of March 1, 1793, provides, that there shall be allowed and taxed in the Supreme, Circuit, and District Courts, in favour of the parties affirming judgments therein, such compensation for their travel and attendance, and for attorney and counsellor's fees, (except in the District Courts in cases of admiralty and maritime jurisdiction,) as are allowed in the Supreme or Superior Courts of the respective States.

Costs go of course on affirming a judgment,(b) and on dismissing a writ of error where the plaintiff in error does not appear.(c) But though they were allowed in one case where the defendant in error was defendant below, and the writ of error was dismissed because the parties did not appear on the record to be citizens of different States,(d) yet the general rule is, that they are not allowed where a writ of error is dismissed for want of jurisdiction in the Supreme Court.(e)

In cases of reversal, costs are not of course,(f) and though they were allowed where the judgment was reversed for want of jurisdiction, the parties not appearing on the record competent to sue and be sued, yet the Court afterwards directed, that when a judgment is reversed for want of jurisdiction, it must be without costs.(g) If there be a judgment in a State Court on a question involving a right set up and claim-

(a) *Brown v. Van Braam*. 3 Dall. 344.

(b) *Montalet v. Murray*. 3 Cranch, 247. 4 Cranch, 47.

(c) *Montalet v. Murray*. 3 Cranch, 247.

(d) *Winchester v. Jackson*. 3 Cranch, 515. But see *Montalet v. Murray*. 4 Cranch, 47.

(e) *Inglee v. Coolidge*. 2 Wheat. 368. *Houston v. Moore*. 3 Wheat. 433.

(f) *Montalet v. Murray*. 4 Cranch, 47.

(g) *Ib.*

ed under a treaty, and that judgment is reversed in the highest Court of the State, and the Supreme Court reverse the latter, and affirm the former judgment, the costs of the whole proceedings follow the judgment in the Supreme Court.*(h)* By a rule of Court made at February Term, 1810, upon the reversal of a judgment of the Circuit Court, the party in whose favour the reversal is, shall recover his costs in the Circuit Court.*(i)*

The costs of a case printed for the use of the Court, will not be allowed in affirming a decree by way of damages for delay.*(k)*

The United States, not being comprehended in the general words of a statute, do not pay costs under this act, and where the Court below, in a case in which the United States were complainants in equity, made a decree dismissing the bill in part, with costs, the Supreme Court affirmed the decree except as to costs, and reversed so much as awarded the United States to pay costs, and directed, that no costs should be allowed to either party in this Court.*(l)* So, on dismissing a writ of error, in which the United States were plaintiffs in error, because it issued improvidently, it was dismissed without costs, the Chief Justice stating, that the United States never pay costs.*(m)*

By a rule of Court, made at February Term, 1808, all parties in this Court, not being residents of the United States, must give security for the costs accruing in this Court, to be entered on the record.*(n)*

(h) *Clerke v. Harwood.* 3 Dall. 342.

(i) Wheat. Dig. xiii.

(k) *Jennings v. The Perseverance.* 3 Dall. 336. This appears to have been a case stated under the 19th sect. of the act of 1789, now repealed.

(l) *United States v. Hooe.* 3 Cranch, 92.

(m) *United States v. Barker.* 2 Wheat. 395. See *United States v. La Vengeance.* 3 Dall. 301.

(n) Wheat. Dig. xii.

A rule made at the same term,(o) provides, that upon the clerk of this Court producing satisfactory evidence by affidavit, or the acknowledgment of the parties, or their sureties, of having served a copy of the bill of costs due by them respectively, in this Court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs. Each party is bound to pay the clerk his fees for services performed for him: and it is immaterial which party recovers judgment.(p)

(o) Wheat. Dig. xii.

(p) Caldwell v. Jackson. 7 Cranch, 276.

CHAPTER XI.

SUPREME COURT—CRIMINAL JURISDICTION.

THE act of September 24th, 1789, sec. 13, gives the Supreme Court, exclusively, all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a Court of law can have or exercise, consistently with the law of nations.

The act for the punishment of certain crimes against the United States, passed the 30th April, 1790, sec. 25 and 26, declares void any writ or process, whereby the person of any ambassador, or other public minister, their domestic, or domestic servants, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached; and subjects the parties concerned to fine and imprisonment.

No proceeding against an ambassador appears to have occurred in the Supreme Court of the United States since the period of its organization. And it may be remarked, that even if a summons be in such case sustainable, a judgment would be of little avail, as the above mentioned act of 1790, seems to take away all process of execution, civil as well as criminal, against the person or goods.

As to consuls, the question has not arisen in the Supreme Court, whether it has original jurisdiction in proceedings against them for offences, either in those which are above, or those which are within the

grade assigned to the District Court by the act of September 24th, 1789, sec. 9 and 11.(a)

Though the third article of the Constitution would authorize Congress to give the Supreme Court appellate jurisdiction, by writ of error from Courts of the United States, in criminal cases embraced by the grant of judicial power, yet they have not done so.(b) The only mode, as we have before seen, in which the appellate power can be exercised by the Supreme Court from a Circuit Court, in a criminal case, is by certificate, where the opinions of the Judges of the Circuit Court are opposed, under the 6th sec. of the act of 29th April, 1802.(c)

(a) See *United States v. Ravara*. 2 Dall. 297. and *ante*. 17. *Commonwealth v. Kosloff*. 5 Serg. and Rawle, 545. *Respublica v. Cobbett*. 3 Dall. 467. 2 Yeates, 352. S. C.

(b) See *United States v. More*. 3 Cranch, 459. *United States v. La Vengeance*. 3 Dall. 301.

(c) See *ante*. 64.

CHAPTER XII.

CIRCUIT COURTS—ORGANIZATION.

THE Circuit Courts are the principal inferior Courts established by act of Congress, in pursuance of the power given by the 3d article of the Constitution, (sec. 1. 1,) to establish inferior Courts.

By the 4th section of the act of September 24th, 1789, Circuit Courts were to consist of any *two* Justices of the Supreme Court, and the District Judge of such District, any two of whom should constitute a quorum ; *provided*, that no District Judge should give a vote in any case of appeal or writ of error from his own decision, but might assign the reasons of such decision. But by the 1st sec. of the act of March 2d, 1793, the attendance of only one of the Justices of the Supreme Court at the several Circuit Courts of the United States to be hereafter held, shall be sufficient, any law requiring the attendance of *two* of the said Justices notwithstanding : *provided* that it shall be lawful for the Supreme Court, in cases where special circumstances shall, in their judgment, render the same necessary, to assign two of the said Justices to attend the Circuit Court or Courts, and it shall be the duty of the Justices so assigned, to attend accordingly. And, *provided also*, that when only one Judge of the Supreme Court shall attend any Circuit Court, and the District Judge shall be absent, or shall have been of counsel, or be concerned in interest, in

any case then pending, such Circuit Court may consist of the said Judge of the Supreme Court alone.(a)

Where the District Judge does not judicially sit in a cause in the Circuit Court, he is considered as absent, in contemplation of law, within the foregoing section, though he be on the bench.(b)

By the act of 13th February, 1801, entitled, an act to provide for the more convenient organization of the Courts of the United States, a new system was established, by virtue of which sixteen Circuit Court Judges were appointed to hold the Circuit Courts, and the Judges of the Supreme Court exercised no other jurisdiction than that vested in the Supreme Court. But by the act of March 8th, 1802, the act of 13th February, 1801, was wholly repealed, and the system abolished. And now, under the act of 29th April, 1802, and other acts, the Circuit Courts are organized as follows.

From the majority of the Districts of the United States are formed seven Circuits, and there is holden, in each of these Districts, a Court called a Circuit Court.

1. First Circuit.

The Districts of New Hampshire, Massachusetts, Rhode Island, and Maine, form the first Circuit,(c) in which the Circuit Court consists of the Justice of the Supreme Court, residing within the said Circuit, and the District Judge of the District where such Court is holden.(d) The sessions of the said Court in the District of New Hampshire, is to be annually holden at Portsmouth, on the 1st May, and at Exe-

(a) See *United States v. Lancaster*. 5 Wheat. 434.

(b) *Bingham v. Cabot*. 3 Dall. 19.

(c) Act of 29th April, 1802, sec. 4. March 30, 1820.

(d) Act of March 26, 1812.

ter, on the 1st October.(e) In the District of Rhode Island, at Newport, on the 15th June, and at Providence, on the 15th November.(f) In the District of Massachusetts, at Boston, on the 15th May, and 15th October.(g) In the District of Maine, at Portland, on the 8th May, and at Wiscasset, on the 8th October.(h) And wherever any of the said days happen on Sunday, the Court is to be holden the day after.

2. The *Second* Circuit is composed of the Districts of Connecticut, New York, and Vermont, to consist of the Justices of the Supreme Court residing therein, and the District Judge of the District where such Court is holden.(i) The sessions in the District of Connecticut, is to be held at New Haven, on the 13th April, and at Hartford, on the 17th September, annually.(k) In the District of New York, at New York, on the 1st April, and 1st September.(l) In the District of Vermont, at Windsor, on the 21st May, and at Portland, on the 3d October.(m)

3. The *Third* Circuit is composed of the Districts of New Jersey, and the Eastern District of Pennsylvania,(n) to consist of the senior Associate Justice of the Supreme Court residing in the fifth Circuit, (Virginia, and North Carolina,)(o) and the District Judge of the District where the Court is holden.(p) The

(e) Act of March 26, 1812.

(f) Ib.

(g) Ib.

(h) Ib.

(i) Act of 29th April, 1802.

(k) Act of March 3, 1797. March 9, 1808.

(l) Act of April 29, 1802.

(m) Ib. Act of 22d March, 1816. March 3, 1797.

(n) Acts of 29th April, 1802. April 20, and December 16 1818. May 15, 1820.

(o) Act of 29th April, 1802. Sect 4.

(p) Act of March 3, 1803.

sessions in the District of New Jersey, is to be held at Trenton, on the 1st of April, and October: in the Eastern District of Pennsylvania, at Philadelphia, on the 11th April, and October.(q)

4. The *Fourth* Circuit is composed of the Districts of Maryland, and Delaware: to consist of the Justice of the Supreme Court, residing within the said Circuit, and the District Judge of the District where such Court is holden.(r) The sessions in the District of Delaware is to be holden at New Castle, on the 3d June, and at Dover, on the 27th October. In the District of Maryland, at Baltimore, on the 1st May, and 7th November.(s)

5. The *Fifth* Circuit embraces the Eastern District of Virginia, and the District of North Carolina, to consist of the present Chief Justice of the Supreme Court, and the District Judge of the District where the Court is holden. The sessions of the Court in the Eastern District of Virginia to be held at Richmond on the 22d May, and 27th November, and in North Carolina at Raleigh, on the 12th May, and 12th November annually.(t)

6. The *Sixth* Circuit comprehends South Carolina, and Georgia: to consist of the Junior Associate Justices of the Supreme Court, and the District Judge of the District where such Court shall be holden. The sessions in South Carolina, to be held at Charleston, on the 20th May, and at Columbia on the 20th No-

(q) Acts of 29th April, 1802. April 20 and December 16, 1818, and May 15, 1820.

(r) Act of 29th April, 1802.

(s) Act of 29th April, 1802.

(t) Ib. Act of March 3, 1797. February 4, 1807. February 4, 1819, and February 10, 1820.

vember. In Georgia, at Savannah, on the 6th May, and at Milledgeville, on the 14th December.(*u*)

7. The *Seventh* Circuit is composed of the District of Kentucky, East and West Tennessee(*x*) and Ohio : to consist of the sixth Associate Judge residing in the seventh circuit, until otherwise allotted, and the District Judge of the district where such Court is holden. The Sessions in Kentucky, to be held at Frankfort, on the 1st Monday of May, and November : in West Tennessee, at Nashville, on the 2d Monday in June : in East Tennessee, at Knoxville, on the second Monday in October : in Ohio at Columbus, on the first Mondays of September and January.(*y*)

In several districts of the United States, owing to their remoteness from any Justice of the Supreme Court, there are no Circuit Courts held. But in these, the District Court there is authorised to act as a Circuit Court, except so far as relates to writs of error or appeals from judgments or decrees in such District Court. See *post*, District Court.

In all cases where the day of meeting of the Circuit Court is fixed for a particular day of the month, if that day happen on Sunday, then, by the act of 29th April, 1802, and other acts, the Court shall be held the next day.

The act of 29th April, 1802, sec. 5, further provides, that on every appointinent which shall be hereafter made, of a Chief Justice, or Associate Justice,

(*u*) Act of 29th April, 1802. March 9, 1808.

(*x*) The Act of 16th March, 1822, provides for the issuing of duplicate writs from any one of the Circuit Courts of East and West Tennessee, where defendants reside in both districts, the proceedings thereupon to be as if the case were single. The Marshal of either Judicial District is to do execution as if the judgment were rendered in his own Court.

(*y*) Acts of February 24, 1807. March 22, 1808. March 10, 1812. March 4, 1820.

the Chief Justice and Associate Justices shall allot among themselves the aforesaid Circuits, as they shall think fit, and shall enter such allotment on record.

And, in case no such allotment shall be made by them, at their sessions next succeeding such appointment, and also, after the appointment of any Judge as aforesaid, and before any other allotment shall have been made, it shall and may be lawful for the President of the United States, to make such allotment as he shall deem proper—which allotment, in either case, shall be binding until another allotment shall be made. And the Circuit Courts constituted by this act shall have all the power, authority, and jurisdiction, within the several districts of their respective circuits, that before the 13th February, 1801, belonged to the Circuit Courts of the United States.

The act of September 24th, 1789, sec. 6, provides, that a Circuit Court may be adjourned from day to day, by one of its Judges, or if none are present, by the Marshal of the district, until a quorum be convened. By the act of May 19th, 1794, a Circuit Court in any district, when it shall happen that no Judge of the Supreme Court attends within four days after the time appointed by law, for the commencement of the sessions, may be adjourned to the next stated term, by the Judge of the district, or, in case of his absence also, by the Marshal of the district. But by the 4th sec. of the act of 29th April, 1802, where only one of the Judges thereby directed to hold the Circuit Courts shall attend, such Circuit Court may be held by the Judge so attending.

By the act of March 2d, 1809, certain duties are imposed on the Justice of the Supreme Court, in case of the disability of the District Judge to hold a District Court. Sec. 1, enacts, that in case of the disability of the District Judge of either of the districts of the United States, to hold a District Court, and to per-

form the duties of his office, and satisfactory evidence thereof being shewn to the Justice of the Supreme Court allotted to that Circuit, in which such District Court ought, by law, to be holden, and on application of the District Attorney, or Marshal of such District, in writing, to the said Justice of the Supreme Court, said Justice of the Supreme Court shall, thereupon, issue his order in the nature of a *certiorari*, directed to the clerk of such District Court, requiring him forthwith to certify unto the next Circuit Court, to be holden in said district, all actions, suits, causes, pleas, or processes, civil, or criminal, of what nature or kind soever, that may be depending in such District Court, and undetermined, with all the proceedings thereon, and all files, and papers relating thereto, which said order shall be immediately published in one or more news papers, printed in said district, and at least thirty days before the session of such Circuit Court, and shall be deemed a sufficient notification to all concerned. And the said Circuit Court shall, thereupon, have the same cognisance of all such actions, suits, causes, pleas, or processes, civil or criminal, of what nature or kind soever, and in the like manner, as the District Court of said district by law might have, or the Circuit Court, had the same been originally commenced therein, and shall proceed to hear and determine the same accordingly: and the said Justice of the Supreme Court, during the continuance of such disability, shall, moreover, be invested with, and exercise all and singular the powers and authority, vested by law in the Judge of the District Court in said district. And all bonds and recognisances taken for, or returnable to, such District Court, shall be construed and taken to be to the Circuit Court to be holden thereafter, in pursuance of this act, and shall have the same force and effect in such Court, as they would

have had in the District Court to which they were taken. *Provided*, that nothing in this act contained shall be so construed, as to require of the Judge of the Supreme Court, within whose circuit such district may lie, to hold any Special Court, or Court of Admiralty, at any other time than the legal time for holding the Circuit Court of the United States in and for such district. Section 2, provides, that the clerk of such district shall, during the continuance of the disability of the District Judge, continue to certify as aforesaid, all suits, or actions, of what nature or kind soever, which may thereafter be brought to such District Court, and the same transmit to the Circuit Court next thereafter to be holden in the same district. And the said Circuit Court shall have cognisance of the same, in like manner as is herein before provided in this act, and shall proceed to hear and determine the same. *Provided nevertheless*, that when the disability of the District Judge shall cease, or be removed, all suits or actions then pending and undetermined in the Circuit Court, in which by law the District Courts have an exclusive original cognisance, shall be remanded, and the clerk of the said Circuit Court shall transmit the same, pursuant to the order of said Court, with all matters and things relating thereto, to the District Court next thereafter to be holden in said district, and the same proceedings shall be had therein as would have been, had the same originated or been continued in the said District Court. Sec. 3, enacts, that in case of the District Judge in any district being unable to discharge his duties as aforesaid, the district clerk of such district shall be authorised and empowered, by leave or order of the Circuit Judge of the circuit in which such district is included, to take, during such disability of the District Judge, all examinations, and depositions of witnesses, and to make all necessary

rules and orders, preparatory to the final hearing of all causes of admiralty and maritime jurisdiction.(z)

If the disability of the District Judge terminate in his death, the Circuit Court must remand the certified causes to the District Court.(a)

By the 1st section of the act of 3d March, 1821, in all suits and actions in any District Court of the United States, in which it shall appear that the Judge of such Court is any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such Judge, on application of either party, to cause the fact to be entered on the records of the Court, and also an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next Circuit Court of the district, and if there be no Circuit Court in such district, to the next Circuit Court in the State, and if there be no Circuit Court in such State, to the most convenient Circuit Court in an adjacent State; which Circuit Court shall, upon such record being filed with the clerk thereof, take cognisance thereof, in the like manner as if such suit or action had been originally commenced in that Court, and shall proceed to hear and determine the same accordingly, and the jurisdiction of such Circuit Court shall extend to all such cases to be removed, as were cognisable in the District Court from which the same was removed.

The Judges of the Supreme Court are not appointed as Circuit Court Judges, or in other words, have

(z) See *Ex parte United States*, 1 Gall. 337. A doubt suggested, whether Congress can, constitutionally, impose on a Justice of the Supreme Court, the authority or duty to hold the District Court. See *Stuart v. Laird*. 1 Cranch, 309. Note to *Hayburn's case*. 2 Dall. 410.

(a) *Ex parte United States*, 1 Gall. 337.

no distinct commissions for that purpose : but practice, and acquiescence under it for many years, were held to afford an irresistible argument against this objection to their authority to act, when made in the year 1808, and to have fixed the construction of the judicial system. The Court deemed the contemporary exposition to be of the most forcible nature, and considered the question at rest, and not to be disturbed then.(b)

If a vacancy exists by the death of the justice of the Supreme Court to whom the district was allotted, the district Judge may under the act of Congress discharge the official duties,(c) except that he cannot sit upon a writ of error from a decision in the District Court.(d)

Congress having a constitutional authority to establish, from time to time, such inferior tribunals as they may think proper, may also transfer a cause from one to the other. They, therefore, had power to transfer a cause from a Circuit Court of the United States, established under the act of 13th February, 1801, to one established under the act of 29th April, 1802.(e)

By the 7th section of the act of September 24th, 1789, the clerk for each District Court is also clerk of the Circuit Court in such district. His oath is prescribed, and he is to give bond.

Although, at one time, the practice existed, for the justice of the Supreme Court who decided the case in the Circuit Court, not to sit when it was brought up from such Circuit Court to the Supreme Court, by writ of error or appeal, yet the practice was subse-

(b) *Stuart v. Laird*. 1 Cranch, 308.

(c) *Pollard v. Dwight*. 4 Cranch, 428. See the 4th section of the act of 29th April, 1802, *ante*. 97.

(d) *United States v. Lancaster*. 5 Wheat. 434.

(e) *Stuart v. Laird*. 1 Cranch, 308.

quently abandoned, and the Court agreed among themselves, not to excuse the Judge who made the decision in the Court below.^(f)

For the power of the District Judge to adjourn the sessions of the Circuit Court to some other place, in case of contagious sickness, see the act of February 25th, 1799.^(g)

In the district of Columbia, there is also a Circuit Court, composed of a Chief Justice, and two associates. This Court was established by particular acts of Congress, which regulate its jurisdiction, and that of the Supreme Court of the United States, on writs of error or appeals therefrom.

(f) Note to *Shirras v. Craig*. 8 Cranch, 42.

(g) *Ante* Supreme Court—Organization.

CHAPTER XIII.

CIRCUIT COURTS—ORIGINAL CIVIL JURISDICTION.

THE 3d article of the Constitution, (sect. 1, 1.) provides, that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may, from time to time, ordain and establish. In pursuance of this grant, Congress have enacted, by the act of September 24th, 1789, sect. 11, that the Circuit Courts shall have original cognisance, concurrent with the Courts of the several States, of all suits of a civil nature at common law, or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State. But no person shall be arrested in one district for trial in another, in any civil action, before a Circuit or District Court. And no civil suit shall be brought before either of the said Courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. Nor shall any District or Circuit Court have cognisance of any suit to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange.

Sect. 12, provides, that the trial of issues in fact in the Circuit Courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury.

A Circuit Court, though an *inferior* Court in the language of the Constitution, is not so in the language of the common law; nor are its proceedings subject to those narrow rules, which the Courts of Westminster applied to special Courts, or inferior Courts held by charter. It is a Court of original and durable jurisdiction: analogous to the Court of King's Bench in England, and entitled to as liberal intendments and presumptions in its favour as any Supreme Court.(a) Still, however, it is a Court of *limited* jurisdiction, and has cognisance not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases which an unlimited jurisdiction would embrace,(b) and the fair presumption is, that a cause is without its jurisdiction, till the contrary appears. So that the facts and circumstances, which give it jurisdiction, must be set forth on the record; and if the fact be denied on which the plaintiff grounds his right to sue in this Court, he must prove it.(c)

Unless jurisdiction in cases arising under the laws of the United States be conferred by act of Congress, the Circuit Court cannot take cognisance of them.(d) It was, therefore, held, that although the Constitution extends the judicial power to all cases in law and equity arising under the laws of the United States,

(a) *Turner v. The Bank of North America*. 4 Dall. 11. *United States v. The Insurgents*. 2 Dall. 340. *Kempe's lessee v. Kennedy*. 5 Cranch, 185.

(b) *Turner v. The Bank of North America*. 4 Dall. 11.

(c) *Turner v. The Bank of North America*. 4 Dall. 11. *Maxfield's lessee v. Levy*. 4 Dall. 350.

(d) *Bank of the United States v. Deveaux*. 5 Cranch, 85. *M'Intire v. Wood*. 7 Cranch, 504. *Hodgson v. Bowerbank*. 5 Cranch, 303.

and the Bank of the United States was a corporation created by a law of the United States, it was not therefore entitled to sue in the Circuit Court; even though the act enabled them to sue "in any Court of record or elsewhere."^(e) So, although patent rights depend altogether on laws of the United States, yet to justify the jurisdiction of the Courts of the United States in sustaining suits by the patentee, it was requisite expressly to recognise his right to sue, in the laws respecting them.^(f) So, it was held, that a citizen of one State could not obtain an injunction in the Circuit Court for a violation of a patent right against a citizen of the same State, as no act of Congress then authorised such suit.^(g)

But though the Courts of the United States are all of a limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shewn upon them, and may in such cases be reversed, yet they are not absolute nullities, which may be totally disregarded.^(h)

The original jurisdiction of the Circuit Court in civil cases may be considered,

1. As to the sum or value of the matter in dispute.
2. As to suits in which the United States are plaintiffs or petitioners.
3. As to suits between citizens of different States.
4. Where an alien is party.

^(e) *Bank of the United States v. Deveaux.* 5 Cranch, 85. But by the present act, passed 10th April, 1816, sect. 7, the existing Bank may sue in any Court of the United States.

^(f) *Ib.*

^(g) *Livingston v. Van Inghen.* 4 Hall's Law Journ. 60.

^(h) *Kempe's lessee v. Kennedy.* 5 Cranch, 185. *Livingston v. Van Inghen.* 4 Hall's Law Journ. 60.

5. As to suits by assignees.
6. As to local actions.
7. As to the privilege of not being sued in a different State.
8. As to suits arising on the acts of Congress respecting patents.

1. As to the sum or value of the matter in dispute.

By the 11th section of the act of September 24th, 1789, the matter in dispute must exceed, exclusive of costs, the sum or value of five hundred dollars, to give the Circuit Court jurisdiction. And by the 20th section of the same act, where, in a Circuit Court, a plaintiff in an action originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, he shall not be allowed, but, at the discretion of the Court, may be adjudged to pay costs.

In suits to recover damages for a tort, the sum laid in the declaration is, it seems, the rule for ascertaining the sum in dispute, under the 11th section, and if, in an action of trespass, the sum laid in the declaration exceeds five hundred dollars, the Court has jurisdiction, though referees should report in favour of the plaintiff less than five hundred dollars.⁽ⁱ⁾

In ejectment, it would be sufficient to fix the jurisdiction, after a verdict for the plaintiff, if the value were then proved on affidavit, or by witnesses: it is not necessary that the jury should find the value, nor will the Court arrest the judgment, because the jury did not find the value.^(k)

In a writ of right, where the property demanded

⁽ⁱ⁾ *Hulscamp v. Teel.* 2 Dall. 356.

^(k) *Den v. Wright.* 1 Peters, 73.

exceeds five hundred dollars in value, if upon trial, the demandant recovers less, he is not allowed his costs, but, at the discretion of the Court, he may be adjudged to pay costs.^(l)

2. As to suits of a civil nature in which the United States are plaintiffs or petitioners.

These may, by the 11th section of the act of September 24th, 1789, be brought in the Circuit Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars.

But these, it seems, do not embrace suits for penalties and forfeitures: for if an act of Congress impose a *qui tam* penalty for an act done, (as the penalty of 2000 dollars formerly imposed by the 22d section of the act of March 22d, 1794, for fitting out a vessel for the slave trade,) without declaring in what Court the suit shall be brought, the Circuit Court has not jurisdiction of the suit, though the sum in dispute exceed five hundred dollars.^(m) The jurisdiction in such case belongs to the District Court.

The acts for the settlement of public accounts, and recovery from debtors to the United States, provide peculiar kinds of evidence and modes of proceeding, in suits brought by the United States.⁽ⁿ⁾

The United States is competent to sue to enforce a contract, or recover damages for its violation, in all cases where a different mode of suit is not pointed out by law, without an act of Congress granting the authority. They may sue in their own names, whenever it appears, not only from the face of an instru-

^(l) *Liter v. Green*. 8 Cranch, 220.

^(m) *Evans qui tam v. Bollen*. 4 Dall. 342. See District Court, *post*.

⁽ⁿ⁾ See act of March 3d, 1797, as to public accounts. March 2d, 1797, sect. 89, as to duties. April 10th, 1816, sect. 23, as to the Bank of the United States. May 11th, 1820, sect. 2, as to lands.

ment, but from all the evidence, that they alone are interested in the subject matter of the suit. They may, therefore, sue on a bill of exchange indorsed to the Treasurer of the United States.^(o) But where an agreement in writing was made with a Commissary General of the United States, whose name was not mentioned in the instrument, and it did not state whether he contracted as agent of the United States, or on his private account, nor that the consideration passed from the United States, or was intended for its use, and the only interest appearing, different from that of the Commissary, was in a third person, and the evidence shewed that the contract was made by such third person, who claimed under it, it was held, that the United States could not maintain a suit under the agreement. If it even appeared, that such contract was made for the benefit of the United States, and also of a third person, a replevin could not be maintained for the whole property, in the name of the United States.^(p)

By the act of 20th April, 1818, sect. 8, in any suit or action which shall be hereafter instituted by the United States, against any corporate body, for the recovery of money, upon any bill, note, or other security, it shall be lawful to summon as garnishees the debtors of such corporation, and it shall be the duty of any person so summoned to appear in open Court, and depose in writing, to the amount which he or she was indebted to the said corporation, at the time of the service of the summons, and at the time of making such deposition, and it shall be lawful to enter up judgment in favour of the United States, in the same manner as if it had been due and owing to the United States: *provided*, that no judgment shall have been rendered against any garnishee, until after judgment

(o) Dugan v. The United States. 3 Wheat. 121.

(p) United States v. Kennan. 1 Pet. 168.

shall have been rendered against the corporation defendant to the said action, nor until the sum in which the said garnishee may stand indebted be actually due. By sect. 9, where any person, summoned as garnishee, shall depose in open Court, that he or she is not indebted to such corporation, nor was not at the time of the service of the summons, it shall be lawful for the United States to tender an issue, and if, upon trial of such issue, a verdict shall be rendered against such garnishee, judgment shall be entered in favour of the United States, pursuant to such verdict, with costs of suit. By sec. 10, if any person summoned as garnishee, under the provisions of this act, shall fail to appear at the term of the Court to which he has been summoned, he shall be subject to attachment for contempt of Court.

No suit can be commenced or prosecuted against the United States; the acts of Congress do not authorise it. (q) No other remedy exists for a creditor of the government than an application to Congress for payment. A lien cannot exist against the government for advances made for the use of the government. (r)

3. As to suits between citizens of different states.

The act of September 24th, 1789, sec. 11, gives to the Circuit Court jurisdiction in suits of a civil nature, of a certain value, between a citizen of the State where the suit is brought, and a citizen of another State.

To vest jurisdiction under this clause, it is necessary that one of the parties should be a citizen of the State in which the suit is brought: for the Circuit Court has no jurisdiction where neither of the parties

(q) *Cohens v. Virginia*. 6 Wheat. 411, 412. *United States v. Barney*. 3 Hall's Law Journ. 130.

(r) *United States v. Barney*. 3 Hall's Law Journ. 130. Per WINCHESTER J. See *post*.

is a citizen of the State in which the suit is brought. As if, in a suit in the Circuit Court of Pennsylvania District, the plaintiff be stated to be a citizen of New York, and the defendant a citizen of New Orleans, the Court has not jurisdiction.^(s) The Constitution extends the judicial power of the United States to controversies between citizens of different States: so that Congress might have conferred on the Circuit jurisdiction in this case ;^(t) but they probably considered that where neither party was a citizen of the State in which the Circuit Court was held, there was no reason why the controversy might not be left to the tribunals of that State.^(u) ●

The word State, in this act, is not used in the sense in which it is employed by writers on general law, to mean a distinct political society, but as used in the Constitution, where it signifies a member of the union. For this reason, a citizen of the District of Columbia,^(x) or of one of the Territories of the United States,^(y) cannot sue a citizen of a State in the Circuit Court.

If there be several plaintiffs, or several defendants, it seems, they must all be competent to sue and be sued in the Circuit Court; otherwise, that Court has no jurisdiction. Thus, where a bill in equity was filed in the Circuit Court of Massachusetts, stating the complainants to be citizens of Massachusetts, and some of the defendants to be citizens of Massachusetts, and one of them to be a citizen of Vermont, it was determined, that the Court could not take cognizance of it.^(z) And if the plaintiffs are not all competent to

^(s) *Shute v. Davis.* 1 Pet. 431.

^(t) *White v. Fenner.* Mason, 520.

^(u) But see *Ib.* Remarks of STORY J.

^(x) *Hepburn v. Elzey.* 2 Cranch, 448. It seems intimated that Congress might vest this jurisdiction.

^(y) *Corporation of New Orleans v. Winter.* 1 Wheat. 91. *Westcott's Lessee v. Inhabitants of Fairfield township.* 1 Pet. 44.

^(z) *Strawbridge v. Curtis.* 3 Cranch, 267.

sue, it makes no difference whether their joinder in action is from necessity, or is voluntary. For, where a citizen of Kentucky, and a citizen of Mississippi Territory, claimed as heirs, and sued the corporation of New Orleans, in the District Court of Louisiana, (acting as a Circuit Court,) to recover certain lands, it was held, that the Court had not jurisdiction.^(a) But where, in a suit in Pennsylvania District, the plaintiff was a citizen of another State, and one of the defendants was a citizen of Pennsylvania, and the other a citizen of a third State, but the process, agreeably to the practice in Pennsylvania, was returned *non est inventus* as to the latter defendant, it was held that the former defendant could not take advantage of the want of jurisdiction as to the other defendant named in the writ, as he was severed, and was no longer to be considered a defendant.^(b)

But a citizen of a different State, who is plaintiff, must be *bona fide* a party interested in the land, for which an ejectment is brought; for if he is not so, but a conveyance has been made to him, by a citizen of the State in which the suit is brought, which is entirely colourable and collusive, it will not give the Court jurisdiction. As where, on a bill of discovery filed on the equity side of the Circuit Court, against the lessor of the plaintiff, a citizen of Maryland, by the defendant, a citizen of Pennsylvania, against whom an ejectment was brought in the Circuit Court of Pennsylvania, the lessor of the plaintiff admitted that he had received a conveyance of the land from a citizen of Pennsylvania, for which he had given no consideration, and that his name had been used only by way of accommodation to the grantor; the ejectment was

(a) Corporation of New Orleans v. Winter. 1 Wheat. 94.

(b) Shute v. Davis. 1 Peters, 431. See Cameron v. M'Roberts. 3 Wheat. 591. The rule in equity.

struck off the record, on motion, without putting the party to plead to the jurisdiction, or requiring him to resort to an injunction.(c) This decision proceeded on two grounds ; first, on the equity of the 11th section of the act of September 24th, 1789, as to assignees of a promissory note, or other chose in action ;(d) secondly, on the attempt by fraud to create a jurisdiction.(e) It does not, therefore, embrace the case where trustees, citizens of Pennsylvania, make a voluntary conveyance to the *cestui que trust*, a citizen of New York, of his share of a large body of lands, and such grantee brings ejectment in the Circuit Court of Pennsylvania, against a citizen of Pennsylvania.(f)

If the jurisdiction has once vested, in a suit between citizens of different States, a subsequent change of domicile by either party, *pendente lite*, does not divest its jurisdiction. Thus where, after a bill filed, one of the complainants removed into, and became a citizen of the same State in which the suit was brought, and in which the defendants resided, it was held that the Court had jurisdiction.(g)

So, if the jurisdiction has once vested, the defendant will not be allowed to withdraw his name from the suit, and thereby to deprive the Court of jurisdiction, though he is no longer interested. Thus, where the defendant, an alien, after the institution of an ejectment against him, and while it was pending, sold the property to a third person, a citizen of the same State as the plaintiff's lessor, and then desired to withdraw his name from the suit, by which the name of the vendee would necessarily be substituted, and the ju-

(c) *Maxfield's Lessee v. Levy*. 4 Dall. 330. 2 Dall. 381.

(d) See *post*.

(e) *Bowne's Lessee v. Arbuckle*. 4 Dall. 338.

(f) *Ib*.

(g) *Morgan's Heirs v. Morgan*. 2 Wheat. 290.

jurisdiction of the Court would be taken away, the Court ordered the name of the original defendant to be retained, the vendee being required to indemnify him against the costs.(h)

A body corporate, as such, cannot be a citizen of a State; and, therefore, if merely described as incorporated by the law of a different State, and established there, it is not sufficient to sustain a suit against them.(i) Where, however, the members of a corporation suing are all citizens of a different State, and are so averred to be, the controversy is, substantially, between citizens of one State, suing by a corporate name, and those of another State, and the Court has jurisdiction.(k) It is not necessary that all the members composing the corporation should be citizens of different States, but only the parties competent to sue or be sued.(l)

A trustee, who is personally competent, as an alien, or citizen of a different State, may sue in the Circuit Court, for the benefit of a *cestui que trust*, who is a citizen of the same State with the defendant.(m) Such trustee is a real person, capable of being a citizen, or alien, having the whole legal estate in himself, and competent to sue in his own right.(n) He cannot, therefore, where he is a citizen of the same State as the defendant, sue in the Circuit Court, on the ground that the *cestui que trust* is a citizen of a different State, or alien.(o) But a suit may be maintained there, if the real plaintiffs be competent to sue, though the nominal plaintiffs be not.(p)

(h) *Thomas's Lessee v. Newton*. 1 Pet. 444.

(i) *Hope Insurance Company v. Boardman*. 5 Cranch, 57.

(k) *Bank of the United States v. Deveaux*. 5 Cranch, 61.

(l) *Ib.* 92.

(m) *Chappedelaine v. Dechenaux*. 4 Cranch, 306.

(n) *Bank of the United States v. Deveaux*. 5 Cranch, 91.

(o) *Ib.*

(p) *Browne v. Strode*. 5 Cranch, 303. See *Post.* as to aliens.

The rule has prevailed, that the record must state the parties to be citizens of different States.^(q) It is not sufficient to describe a party as *of* a particular State,^(r) or that he *resides* in a different State,^(s) or, in case of a corporation sued, that they are incorporated by the laws of a State,^(t) or legally incorporated by the laws of a State, and established at a place there.^(u) So, if a blank be left in the declaration, for the State of which the plaintiff is a citizen, it is fatal,^(x) and the Supreme Court, on error brought, will reverse the proceedings; and that, it seems, even where the plaintiff himself assigns for error this defect in his own declaration.^(y)

4. As to suits where an alien is party.

The 11th section of the act of September 24th, 1789, gives the Circuit Court cognisance of all suits of a civil nature, where an alien is party. But these general words must be restricted by the Constitution, which gives jurisdiction in controversies between a State or citizens of a State, and foreign States, citizens or subjects: and the statute cannot extend the jurisdiction beyond the limits of the Constitution.^(z) If, therefore, the plaintiff be an alien, and it be so averred, the defendant must be averred to be a citizen of a

(q) See its propriety doubted, *Abercrombie v. Dupuis*. 1 Cranch, 343.

(r) *Bingham v. Cabot*. 3 Dall. 382. *Wood v. Wagon*. 2 Cranch, 1

(s) *Abercrombie v. Dupuis*. 1 Cranch, 343.

(t) *Sullivan v. The Fulton Steam Boat Company*. 6 Wheat. 450.

(u) *Hope Insurance Company v. Boardman*. 5 Cranch, 57.

(x) *Turner v. Enrille*. 4 Dall. 7.

(y) *Capron v. Van Norden*. 2 Cranch, 125. See *Aliens, post*.

(z) *Mossman v. Higginson*. 4 Dall. 11. *Hodgson v. Bowerbank*. 5 Cranch, 303.

State.(a) For the same reason, where both parties are aliens, the Circuit Court has no jurisdiction.(b)

If the real plaintiff be an alien, and the nominal plaintiffs be merely official obligees under a statute, as where the suit was for a debt due by a testator to a British subject, and was on a bond given by the executor of such testator, for the faithful execution of the will, to the nominal plaintiffs, who were Justices of the Peace of a county, though the nominal plaintiffs, and the defendants be citizens of the same State, the Circuit Court has jurisdiction.(c)

A residuary legatee, and an administrator *de bonis non*, who are aliens, may bring suit in equity in the Circuit Court as trustees, against a citizen of the State, although the testator and the defendant were both citizens of such State.(d)

The alienage, from which the jurisdiction of the Court arises, must be stated on the record.(e) For if a blank be left,(f) or there be an omission of it,(g) it is fatal. So, if one party be averred to be an alien, the other must be averred to be a citizen of a State.(h)

But an alien enemy cannot sustain a suit in the Courts of the United States, if it be taken advantage of by a proper plea in abatement.(i) It seems, however, that if an alien plaintiff become an enemy after

(a) *Mossman v. Higginson*. 4 Dall. 11. *Hodgson v. Bowerbank*. 5 Cranch, 313.

(b) *Montalet v. Murray*. 4 Cranch, 46. *Mossman v. Higginson*. 4 Dall. 11.

(c) *Brown v. Strode*. 5 Cranch, 303.

(d) *Chappedelaine v. Dechenaux*. 4 Cranch, 306.

(e) See *ante*. 114, suits between citizens of different States.

(f) *Turner v. Enrille*. 4 Dall. 7.

(g) *Course v. Stead*. 4 Dall. 22. *Williamson v. Kincaid*. 4 Dall. 20.

(h) *Mossman v. Higginson*. 4 Dall. 12. *Hodgson v. Bowerbank*. 5 Cranch, 303.

(i) *Mumford v. Mumford*. 1 Gallison, 366. See *Stoughton v. Taylor*. Nat. Int. December.

obtaining judgment in the Circuit Court, it is no objection, on a writ of error, to the affirmance of that judgment in the Supreme Court.(j)

5. As to suits by assignees.

The act of September 24th, 1789, sect. 11, imposes the restriction, that no Circuit or District Court shall have cognisance of any suit, to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. The obvious policy of this restriction is, to prevent the making of assignments for the purpose of giving jurisdiction to the Court: foreign bills of exchange are excepted, lest it might impede their circulation.(k)

A note payable to W. P., or bearer, is not within this clause: and the bearer may sue in the Circuit Court, if a citizen of a different State, without shewing W. P. to be a fictitious person, or competent to have prosecuted a suit.(l)

The act is not confined to assignable paper, though that was the principal object of the provision. Equitable, as well as legal assignments, are included. The assignee of an open account is precluded, as much as the assignee of a note.(m) Assignees by operation of law, as where the estate of an insolvent is vested in them by law, are embraced by the provision, as much as assignees in deed.(n) Therefore, the plaintiffs, though aliens, being appointed syndics of certain insolvents, who were citizens of the District of Or-

(j) *Owens v. Hanney*. 9 Cranch, 180.

(k) See it remarked on by STORY J. *Bullard v. Bell*. *Mason*, 251.

(l) *Ib*.

(m) *Seré v. Pitot*. 6 Cranch, 332.

(n) *Ib*.

leans, and being vested by law with their property, were held incompetent to sue a citizen of Orleans, for debts due the insolvents, in the District Court of that Territory, (acting as a Circuit Court,) the insolvents themselves not having been competent to sue the defendant in that Court, for these debts.(o) But, it seems, an administrator *de bonis non*, or a residuary legatee, is not considered as such assignee, and, therefore, if personally capable of suing, as if he is an alien, he is not prohibited by this clause, though his testator were a citizen of the same State with the defendant.(p) The indorsee of a promissory note, who is a citizen of one State, may sue the indorser, who is a citizen of another State, in the Circuit Court, whether the indorser could sue the maker in that Court or not.(q)

And if the plaintiff claim as assignee, it must appear by the record, that the person, under whom he claims by assignment, might have prosecuted his suit in the Circuit Court; otherwise the Court has no jurisdiction.(r)

As to what facts constitute citizenship of a State, see the case of *Knox v. Greenleaf*.(s)

6. As to local actions.

The jurisdiction of the Circuit Court is farther restricted by the nature of the action, through which a remedy is sought. Trespass *quare clausum fregit* does not lie in the Circuit Court, for a trespass committed by the defendant, on lands of the plaintiff, lying within the United States, but without the district in which

(o) *Seré v. Pitot*. 6 Cranch, 332.

(p) *Chappedelaine v. Dechenaux*. 4 Cranch, 306.

(q) *Young v. Bryan*. 6 Wheat. 146.

(r) *Turner v. The Bank of North America*. 4 Dall. 8. *Montalet v. Murray*. 4 Cranch, 46.

(s) 4 Dall. 360.

the Court is situate, though the defendant be a citizen of the State in which the suit is brought, and the plaintiff a citizen of a different State. Such an action is local, and must be brought in the Court of the district where the land lies. It was, therefore, held, that the plaintiff, a citizen of Louisiana, could not sue the defendant, a citizen of Virginia, in the Circuit Court of Virginia, for a trespass on lands alleged to have been committed at New Orleans.(t)

7. As to the privilege of not being arrested or sued, out of the district where defendant resides, or is found.

The act of September 24th, 1789, sec. 11, further provides, that no person shall be arrested in one district, for trial in another, in any civil action before a Circuit or District Court. And no civil suit shall be brought, before either of the said Courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ.

By virtue of this act, a citizen of one State may be sued in a different State, if the process be served upon him in the latter. But in such case, the plaintiff must be a citizen of the latter State, or an alien.(u)

This clause is not a restriction of the jurisdiction of the Court, but a grant of a personal privilege, that of not being served with process out of the district in which a defendant resides, or is found: and this is the case as well with regard to arrests, as to other process at law or equity. Being such personal privilege, it may be waived. Thus, if a defendant who is served in the State where he resides, with equity process from the Circuit Court of another State, appear

(t) *Livingston v. Jefferson*. 4 Hall's Law Journ. 78.

(u) *Shute v. Davis*. 1 Pet. 431.

to such process, and answer without objecting to it, he thereby waves his privilege, and the Court has jurisdiction.(x) But if the defendant appear, and put in a plea, claiming the benefit of the privilege, it is not a waiver.(y) An appearance to the subpoena by a solicitor of the Court, unaccompanied by any objection, would amount to such waiver, notwithstanding, at a subsequent term, a plea is put in claiming the privilege.(z) But in a question on the validity of such plea, the Court will not notice the docket entries, purporting to shew an appearance by a solicitor without objection at a preceding term. Whether the defendant gave authority to the solicitor to appear, is a matter of fact which he may deny, and can be decided only on pleadings which put it in issue.(a)

In consequence of this clause, a foreign attachment will not lie in the Circuit Court, against a person as defendant, who is an inhabitant of another State : and if brought, the Court will quash it, with costs.(b) But it seems, if the defendant appear by entering special bail, it is a waiver of all objections to non service of process, and the Court has jurisdiction.(c) A foreign attachment, however, may be issued in a Circuit Court against an alien as defendant,(d) where the State laws recognize that mode of proceeding.

8. Jurisdiction respecting patents.

The 10th section of the act of February 21st, 1793, provides a mode of proceeding before the Judge of the District Court, by rule to shew cause, in order to procure the repeal of a patent obtained surreptitious-

(x) *Logan v. Patrick.* 5 Cranch, 288.

(y) *Harrison v. Brown.* 1 Pet. 489.

(z) *Ib.*

(a) *Ib.*

(b) *Hollingsworth v. Adams.* 2 Dall. 396.

(c) *Pollard v. Dwight.* 4 Cranch, 421.

(d) *Fisher v. Consequa.* Serg. on Attach. 44.

ly, or upon false suggestion.^(e) The 5th section provided for the damages to be recovered in an action on the case, but it was repealed by the 4th section of the act of April 17th, 1800, and supplied by the 3d section of that act, by which it is provided, that where any patent shall be, or shall have been granted, pursuant to this act, or the above mentioned act, and any person, without the consent of the patentee, his or her executors, administrators, or assigns, first obtained in writing, shall make, devise, use, or sell the thing, whereof the exclusive right is secured to the said patentee by such patent, such person so offending shall forfeit and pay to the said patentee, his executors, administrators, or assigns, a sum equal to three times the actual damage sustained by such patentee, his executors, administrators, or assigns, from or by reason of such offence, which sum shall and may be recovered by action on the case, founded on this and the above mentioned act, in the Circuit Court of the United States having jurisdiction thereof.

The 6th section of the act of February 21st, 1793, contains also a provision, which is still in force, that the defendant in such action shall be permitted to plead the general issue, and give this act, and any special matter, of which notice in writing may have been given, to the plaintiff or his attorney thirty days before trial, in evidence, tending to prove, that the specification filed by the plaintiff does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect, which concealment or addition shall fully appear to have been made for the purpose of deceiving the public, or that the thing thus secured by patent was not originally discovered by the patentee, but had been in use, or had been described, in some public work, an-

(e) See District Court.

terior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person: in either of which cases, judgment shall be rendered for the defendant, with costs, and the patent shall be declared void.

It was held by the Supreme Court of New York, in the year 1810, that the State Courts had no jurisdiction in actions brought for the infringement of patent rights, granted by the United States; inasmuch as the above act of 17th April, 1800, declares, that such suits shall be brought in the Circuit Court of the United States, and the act of 21st February, 1793, enacts, that in certain cases, where judgment shall be rendered for the defendant, the Court shall have power to declare the patent void.(f) It is even doubted, whether a person claiming by virtue of such patent, can set it up in a State Court as a defence to a suit brought by one to whom the State had granted an exclusive right, as the acts of Congress have vested the Courts of the United States with exclusive cognisance of all infringements of patent rights, and the party should go into one of them to test the validity of his patent, and procure redress.(g)

A late act of Congress passed on the 15th February, 1819, further provides, that the Circuit Courts shall have original cognisance, as well in equity as at law, of all actions, suits, controversies, and cases, arising under any law of the United States, granting or confirming to authors, or inventors, the exclusive right to their respective writings, inventions, and discoveries, and, upon any bill in equity filed by any party aggrieved, in any such cases, shall have authority to grant injunctions, according to the course and principles of Courts of Equity, to prevent the violation of the rights

(f) *Parsons v. Barnard*. 7 Johns. 144.

(g) *Livingston v. Van Ingen*, 9 Johns. 507.

of any authors or inventors, secured to them by any of the laws of the United States, on such terms and conditions as the said Courts may deem fit and reasonable. *Provided, however,* that from all judgments and decrees of any Circuit Courts, rendered in the premises, a writ of error, or appeal, as the case may require, shall lie to the Supreme Court of the United States, in the same manner, and under the same circumstances, as is now provided by law in other judgments and decrees of such Circuit Courts.(h)

(h) See Writs of Error and Appeals.

CHAPTER XIV.

CIRCUIT COURT—REMOVALS FROM STATE COURTS.

FURTHER to secure the right of recourse to the tribunals of the United States, in controversies to which the judicial power is extended by the Constitution; the act of September 24th, 1789, gives, in certain cases, the right of removing a suit instituted in a State Court, from such State Court to the Circuit Court of the district.

1. By the 12th section, if a suit be commenced in any State Court against an alien, or by a citizen of the State in which the suit is brought, against a citizen of another State, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the Court, and the defendant shall, at the time of entering his appearance in such State Court, file a petition for the removal of the cause for trial, into the next Circuit Court to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such Court, on the first day of its session, copies of said process against him, and also for his then appearing and entering special bail in the cause, if special bail was originally required therein, it shall then be the duty of the State Court to accept the surety, and proceed no further in the cause. And any bail that may have been originally taken shall be discharged. And the said copies being entered as aforesaid in such Court of the United States, the cause

shall there proceed in the same manner, as if it had been brought there by original process. And any attachment of the goods or estate of the defendant, by the original process, shall hold the goods or estate so attached, to answer the final judgment, in the same manner as by the laws of such State they would have been holden to answer final judgment, had it been rendered by the Court in which the suit commenced.

As all suits against an alien are not embraced by the Constitution, but only suits between an alien and a State, or a citizen thereof, it seems, this act must be restrained accordingly.(a)

If it be made to appear to the satisfaction of the State Court, that the sum in dispute exceeds five hundred dollars, exclusive of costs, and thereupon the case is removed to the Circuit Court, and the plaintiff declares for 1000 dollars, he cannot, by afterwards releasing part of his demand, and thereby reducing it below 500 dollars, oust the Circuit Court of its jurisdiction.(b)

But, it seems, the defendant's petition to the State Court for removal, must be actually filed at the term when his appearance is entered.(c) If he suffer the term at which the suit is brought, and at which he appeared, and the next succeeding term, to pass over without filing his petition, a petition afterwards filed, will not give the Circuit Court jurisdiction, although the State Court agree to consider the petition as filed of the proper term when the appearance was entered, *nunc pro tunc*.(d) And if a cause is improperly removed, it is the duty of the Circuit Court to remand it to the Court from which it came, and on error from

(a) *Mossman v. Higginson*. 4 Dall. 11. *Hodgson v. Bower*—bank. 5 Cranch. 303. See *ante*. 114.

(b) *Wright v. Wells*. 1 Pet. 220. See the case.

(c) *Gibson v. Johnson*. 1 Pet. 44.

(d) *Ib.*

the Circuit Court to the Supreme Court, the latter would, in such case, be bound to remand it.(e)

The defendant, after removing the cause to the Circuit Court and appearing there, cannot object that the Circuit Court has not jurisdiction, because, being an inhabitant of the United States, the process of foreign attachment, by which the suit was commenced, was served in a district of which he was not an inhabitant, and in which he was not found: for, by appearing to the action, he places himself precisely in the same situation as if process had been served upon him, and waves all objections to the non-service of process.(f)

The Supreme Court of Pennsylvania decided in the year 1798, that an action of debt, founded on a recognisance for good behaviour, alleged to be forfeited, brought in that Court by the Commonwealth of Pennsylvania against an alien, was not such a suit as the defendant was entitled to remove from that Court to the Circuit Court, under the foregoing provision of the act of September 24th, 1789, because it was a proceeding of a criminal nature, and because the act of Congress did not contemplate such a removal of a suit brought by a State.(g)

It was held, in the Supreme Court of Appeals of the State of Virginia, that if an inferior Court refuse to allow the defendant to remove a cause which is within the purview of the act of Congress, to the Circuit Court, on his complying with the terms prescribed by the act, such inferior Court may be compelled to allow

(e) Pollard v. Dwight. 4 Cranch, 421.

(f) Pollard v. Dwight. 4 Cranch, 421. See Patterson v. United States. 2 Wheat. 221. Hollingsworth v. Adams. 2 Dall. 396, and ante. 119.

(g) Republica v. Cobbett. 3 Dall. 467. 2 Yeates, 352, S. C. See Rush v. Cobbett. 2 Yeates, 275.

it, by mandamus from the superior Court of the State, not from the Circuit Court.(h)

2. Of removals from a State Court, by parties claiming titles to land, under grants of different States.

By the Constitution, art. iii. sect. 2, 1, The judicial power shall extend to controversies between citizens of the same State, claiming lands under grants of different States. By a clause of the 12th section of the act of September 24th, 1789, it is enacted, that if, in any action commenced in a State Court, the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the Court, either party, before the trial, shall state to the Court, and make affidavit, if it require it, that he claims, and shall rely upon a right or title to the land, under grant from a State, other than that in which the suit is pending, and produce the original grant, or an exemplification of it, except where the loss of records shall put it out of his power, and shall move that the adverse party inform the Court, whether he claims a right or title to the land under a grant from the State in which the suit is pending; the said adverse party shall give such information, otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he informs that he does claim under any such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial, to the next Circuit Court to be holden in such district. But if he is the defendant, shall do it under the same regulations as in the before mentioned case of the removal of a cause into such

(h) *Brown v. Cuppin and Wise.* 4 Hen. & Munf. 173.

Court by an alien. And neither party removing the cause shall be allowed to plead, or give evidence of, any other title than that by him stated as aforesaid, as the ground of his claim.

Where the plaintiffs claimed under a grant from the State of Vermont, and the defendants under a grant from New Hampshire, which latter grant was made at the time when New Hampshire comprehended the whole territory of Vermont, it was contended that the case did not come within this clause of the Constitution, because the States were not different at the time of the defendants' grant, but it was made as much by Vermont as by New Hampshire. But the Court held, that the grants arose under different States within the letter and meaning of the Constitution.⁽ⁱ⁾ And the law is the same where both parties claim under grants made by different States, although the inceptive titles, as for instance, the warrants and locations thereon, in pursuance of which the grants took place, were derived from one and the same State, before its separation into two States. The Constitution and laws look to the *grants* as the foundation of jurisdiction, and not to any equitable title previous thereto.^(k)

⁽ⁱ⁾ Town of Pawlet v. Clark. 9 Cranch, 292.

^(k) Colson v. Lewis. 2 Wheat. 378. There seems a mistake in the case, in stating the complainants to be citizens of Virginia.

CHAPTER XV.

CIRCUIT COURT—MANDAMUS.

NOTWITHSTANDING, by the 11th section of the act of September 24th, 1789, the Circuit Courts have original cognisance of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs; and by the 14th section of the same act, they have power to issue all writs necessary for the exercise of their jurisdiction, and agreeable to the principles and usages of law, yet they have not power to issue a mandamus to a ministerial officer or agent of the United States, commanding him to do an act, which the party alleges ought to be done for his benefit, under the laws of the United States. For though, by the Constitution, the judicial power of the United States extends to all cases arising under the laws of the United States, yet the authority over all such cases by mandamus is not given to the Circuit Court by the acts of Congress. The power to issue a mandamus is confined, exclusively, to cases in which it may be necessary for the exercise of a jurisdiction already existing; as, for instance, if the Court below refuse to proceed to judgment, there a mandamus in nature of a *procedendo*, may issue. It was, therefore, held, that a mandamus could not be issued by the Circuit Court of the United States, to the register of a land office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in that State, to which the plaintiff laid claim under the laws of the

United States.(a) Nor will the circumstance, that the parties are citizens of different States, and therefore of a description of persons competent to sue and be sued in the Circuit Court, make any difference. The proper remedy for the party is, an action against the officer for damages, or to recover the specific property, according to circumstances, in Courts of competent jurisdiction.(b)

(a) *M^cIntire v. Wood*, 7 Cranch, 504. *M^cClung v. Silliman*, 6 Wheat. 598. It appears that in one case, this writ was issued by the Circuit Court of South Carolina, to the collector of Charleston, commanding him to grant a clearance to a vessel. *Ex parte Gilchrist v. The Collector of Charleston*. 1 Hall's Law Journ. 249. But it seems, it issued by consent. *M^cIntire v. Wood*. 7 Cranch, 506.

(b) *M^cClung v. Silliman*. 6 Wheat. 598.

CHAPTER XVI.

CIRCUIT COURT—CRIMINAL JURISDICTION.

By the act of September 24th, 1789, sect. 11, the Circuit Court shall have exclusive cognisance of all crimes and offences cognisable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the District Courts of the crimes and offences cognisable therein.

Under this act, the Circuit Court has jurisdiction in an indictment against a consul from a foreign power where the punishment is beyond the grade assigned to the District Court.(a)

The jurisdiction of the Circuit Court in criminal cases is final, unless on points in which the opinions of the Judges are opposed.(b)

Though the District Court, by the act of September 24th, 1789, has cognisance of all penalties and forfeitures incurred under the laws of the United States, yet where the law declares an act to be an offence, and treats it as a criminal act, it must be prosecuted criminally in the Circuit Court, either by indictment, or, if given by the act, by information.(c) And the distinction ought to be preserved, because penalties

(a) *United States v. Ravara.* 2 Dall. 297. See *ante*, 17, and *Common Law Jurisdiction*, *post*.

(b) *United States v. More.* 3 Cranch, 171. See *ante*, 64.

(c) *United States v. Mann.* 1 Gall. 3. 177. *United States v. Tyler.* *Ib.* and 7 Cranch, 285. See *District Court*.

and forfeitures may be remitted by the Secretary of the Treasury: but crimes and offences can be remitted only by the President, under his pardoning power vested by the Constitution.(d)

But military offences are not included in the act of September 24th, 1789, conferring jurisdiction on the Circuit and District Courts. They never are cognisable in common law Courts. Courts martial are the proper tribunals for their decision: and, therefore, the acts of Congress punish offences of this kind by courts martial, as well when committed by the militia of the United States, as by the army and navy.(e) And if an act of Congress vest the jurisdiction over military offences in a court martial, when necessary, without specifying by what authority it is to be held, the jurisdiction is not exclusive of a State court martial, organised under a State law.(f)

As the criminal jurisdiction vested by this act in the Circuit and District Courts, is expressly exclusive, and embraces all crimes and offences cognisable under the authority of the United States, the State Courts cannot entertain jurisdiction in any such cases, unless it be expressly vested in them by an act of Congress, which, so far, expressly or impliedly repeals the act of September 24th, 1789. Hence it is, that the act of 24th February, 1807, concerning forgery of the notes of the Bank of the United States, contains a proviso, saving to the Courts of the several States jurisdiction under State laws, over offences made cognisable by that act. A similar proviso is to be found in the act of the 21st April, 1806, concerning counterfeiters of the current coin of United States.(g)

There are other acts of Congress which permit ju-

(d) United States v. Mann. 1 Gall. 177.

(e) Houston v. Moore. 5 Wheat. 29.

(f) Ib.

(g) Ib. 26.

jurisdiction over the offences described in them to be exercised by State Courts and State magistrates.^(h) And in all these cases where the jurisdiction of the two Courts is concurrent, the sentence of either Court, whether of acquittal or conviction, may be pleaded in bar to a prosecution in the other for the same offence; as in civil cases, may be the judgment of either.⁽ⁱ⁾

By the 3d section of the act of March 2d, 1793, the Supreme Court, or where the Supreme Court shall not be sitting, any one of the Justices thereof, together with the Judge of the district, within which a special session, as hereafter authorised, shall be holden, may direct special sessions of the Circuit Courts to be holden, for the trial of criminal causes, at any convenient place within the district, nearer to the place where the offences may be said to be committed, than the place or places appointed by law for the ordinary sessions. The clerk of such Circuit Court shall, at least thirty days before the commencement of such special session, cause the time and place for holding the same to be notified, for at least three weeks successively, in one or more of the newspapers published nearest to the place where the sessions is to be holden. All process, writs, and recognisances of every kind, whether respecting juries, witnesses, bail, or otherwise, shall be considered as belonging to such sessions, in the same manner as if they had been issued and taken in reference thereto. Any special sessions may be adjourned to any time or times, previous to the next stated meeting of the Circuit Court. And all business, depending for trial at any special Court, shall, at the close thereof, be considered as of

(h) See *post*. Jurisdiction of State Courts and Magistrates.

(i) *Houston v. Moore*. 5 Wheat. 31. See also *The People v. Lynch*. 11 Johns. Rep. 549.

course removed to the next stated term of the Circuit Court.

This section, it seems, is to be applied to cases not capital ; for the 29th sect. of the act of September 24th, 1789, directing that in cases punishable with death, the trial shall be had in the County where the offence was committed, or when that cannot be done without inconvenience, twelve petit jurors at least shall be summoned from thence, vests in the Judges a power of holding a Special Court in the proper County. At any rate, though the word used in the act of 1793, is *nearer*, the Court could hold the session in the County itself.(j) It is doubtful, however, whether indictments for treason, found at a regular Circuit Court, could be transferred to a Special Court ; and whether, after indictments found, and plea pleaded, in the regular Circuit Court, the trial being thus commenced, they can be determined elsewhere.(k) It is also doubtful, whether, if a Special Court were to be appointed previously to the Stated Court, both could be in session at the same time : or, whether two grand juries could be impannelled at the same time, for the same district, and both be qualified to present all offences committed within their jurisdiction. It is also doubtful, whether a Special Court can be appointed at a distant period, to overleap the session of the Stated Court.(l) But, at all events, the Court will not grant a Special Court, for the trial of prisoners charged with treason, in the county where the offence was committed, if it has recently been in a state of insurrection, which required an armed force to quell, and where the judiciary would need the aid of a military force to enable it to discharge its functions,(m)

(j) United States v. Insurgents. 3 Dall. 513.

(k) Ib. United States v. Hamilton. 3 Dall. 17.

(l) United States v. Insurgents. 3 Dall. 513.

(m) Ib.

Where the defendant is under recognisance to appear in the Circuit Court, and answer an information under an act of Congress, the Court will not discharge the bail, on the ground that the defendant has been arrested, and is in custody, in another County, under process from a State Court. Perhaps, it may continue the information, and respite the recognisance. Nor has the Court authority to issue a *habeas corpus*, to bring up such defendant, in order to surrender him in discharge of the bail, who had entered into recognisance for his appearance in such Circuit Court, to answer an information for a misdemeanor, under an act of Congress.⁽ⁿ⁾

By the act of 30th March, 1802, and other acts relative to the Indians, jurisdiction is vested in the Circuit, District, and Territorial Courts, over offences committed in violation of their provisions, and in case of a crime punishable with death, a commission of Oyer and Terminer may, in certain cases be issued by the President, or Governor of a Territory.

(n) United States v. French. 1 Gall. 1.

CHAPTER XVII.

CIRCUIT COURT—APPELLATE JURISDICTION.

THE appellate jurisdiction of the Circuit Court, may be considered,

1. As to writs of error to judgments of the District Court, in civil cases at common law.

2. Appeals from the District Court, in cases of admiralty and maritime jurisdiction.

3. *Certiorari, procedendo, &c.*

1. Of writs of error from the Circuit to the District Court.

The 11th section of the act of September 24th, 1789, provides, that the Circuit Courts shall also have appellate jurisdiction from the District Courts, under the regulations and restrictions herein after provided.

By the 22d section, final decrees and judgments in civil actions in a District Court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a Circuit Court holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the Judge of

such District Court, or a Justice of the Supreme Court, the adverse party having at least twenty days notice.

But there shall be no reversal on such writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of; or, in case the person entitled to such writ of error be an infant, *non compos mentis*, or imprisoned, then within five years, as aforesaid, exclusive of the time of such disability. And every Justice or Judge signing a citation or any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs, if he fail to make his plea good.

By sect. 23, a writ of error as aforesaid shall be a *supersedeas*, and stay execution, in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue, in any case where a writ of error may be a *supersedeas*. And where, upon such writ of error, a Circuit Court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error, such damages for his delay, and single or double costs at their discretion.

By the act of 12th December, 1794, the security to be required and taken, on the signing of a citation on any writ of error, which shall not be a *supersedeas*, and stay execution, shall be only to such amount as, in the opinion of the Justice or Judge taking the same, shall be sufficient to answer all such costs as, upon an

affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error.(a)

The 5th section of the act of 29th April, 1802, provides, that in all cases which by appeal or writ of error, are, or shall be removed from a District to a Circuit Court, judgment shall be rendered in conformity to the opinion of the Judge of the Supreme Court presiding in such district.

As the district Judge cannot sit in the Circuit Court on a writ of error to the District Court, there can be no opposition of opinion under the 6th section of the act of 29th April, 1802, and, therefore, in such case, no removal to the Supreme Court can take place by certificate.(b) So that the decision of the Justices of the Supreme Court is final. Nor does a writ of error lie from the Supreme to the Circuit Court, to remove a judgment rendered upon a writ of error from the District Court.(c)

A writ of error does not lie from a Circuit to a District Court in an admiralty or maritime cause.(d)

The 24th section of the act of September 24th, 1789, enacts, that where a judgment or decree shall be reversed in a Circuit Court, such Court shall proceed to render such judgment or pass such decree, as the District Court should have rendered or passed. And the Supreme Court shall do the same on reversals therein, except where the reversal is in favour of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed are uncertain, in which case they shall remand the cause for a final decision.

(a) For the construction of these acts, see *ante*, 32. 72.

(b) *United States v. Lancaster*. 5 Wheat. 434, *ante*, 63.

(c) *United States v. Ten Brock*. 2 Wheat. 242, and cases cited, *ante*, 31.

(d) *United States v. Wonson*. 1 Gall. 5.

This exception is confined to reversals in the Supreme Court, and does not apply to reversals in the Circuit Court. The Circuit Court, on a reversal in favour of the plaintiff, is not obliged to remand the cause in all cases. And if the defendant below plead three pleas, on two of which issues in law are joined, and on the third an issue in fact, and the Court below give judgment for the defendant on the issues in law, and the issue in fact be not tried, and the Circuit Court on error reverse the judgment, it may award a *venire facias de novo*, and try the issue at the bar of the Circuit Court.(e)

If a case is reversed upon a special verdict, or case agreed, the Circuit Court will proceed to give judgment. But where a verdict in favour of a plaintiff is reversed, on a bill of exceptions to instructions given to the jury, a new trial may be awarded by the Circuit Court.(f) And it would seem, if the special verdict, or case, should be defective, a *venire facias de novo* may be awarded.(g)

Error lies to the District Court on a judgment given there in a *scire facias*, to repeal letters patent, under the act of 21st February, 1793, sect. 10.(h)

2. Appeals from the District Court.

Appeals to the Circuit Court take place only in civil causes of admiralty or maritime jurisdiction.

The act of September 24th, 1789, sect. 21, provided, that from final decrees in a District Court in cases of admiralty and maritime jurisdiction, where the matter in dispute exceeded the sum or value of

(e) United States v. Sawyer. 1 Gall. 86.

(f) Ib. Hudson v. Guestier, note. 6 Cranch, 285.

(g) United States v. Sawyer. 1 Gall. 86.

(h) Stearns v. Berrett. Mason, 153.

three hundred dollars, exclusive of costs, an appeal should be allowed to the next Circuit Court to be held in such district. And the 20th section declared, that where a libellant upon his own appeal recovered less than the sum of three hundred dollars, he should not be allowed, but at the discretion of the Court, might be adjudged to pay costs. But by the act of March 3d, 1803, sect. 2, it is enacted, that from all final judgments or decrees in any of the District Courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the Circuit Court, next to be holden in the district where such final judgment or judgments, decree or decrees may be rendered. And the Circuit Courts are thereby authorised and required, to hear and determine such appeal.⁽ⁱ⁾ As by the 21st section of the act of September 24th, 1789, appeals from the District Court must be prosecuted at the next Circuit Court after pronouncing the decree, on failure of the appellant, claimant in a prize cause, to enter and prosecute his appeal, the appeal may be pronounced to be deserted, and the principal cause remitted to the Court below for final proceedings. In such case, the taxation of the costs may be retained in the Circuit Court, or be directed to be made in the Court below. Or, the appellee may produce the record, and have the principal cause retained in the Circuit Court, and upon a hearing *ex parte*, claim an affirmance with costs.^(k)

The appeal is confined to civil causes of admiralty and maritime jurisdiction; it does not lie from the District to the Circuit Court in common law suits: the proper remedy in such suits is by writ of error. The word *judgment*, in the act of March 3d, 1803, is not

(i) See *United States v. Wonson*. 1 Gall. 5, as to Security, &c.

(k) *Privateer Montgomery v. Schooner Betsy*. 1 Gall. 416.

used in contradistinction to *decree*, but as explanatory and equivalent. Even supposing an appeal lay, yet if the cause has been tried by a jury in the District Court, it cannot again be tried by jury in the Circuit Court.*(l)* Nor, on the other hand, does a writ of error lie from a Circuit to a District Court, in an admiralty or maritime cause: not even on the judgment entered on the bond given by a claimant, to restore the goods, under the 89th section of the collection law.*(m)*

An appeal in an admiralty and maritime cause, removes the whole proceedings, and opens the facts as well as the law, to re-examination.*(n)* It suspends the sentence: and it is not *res adjudicata*, till the final sentence of the Appellate Court.*(o)* This has been the constant practice, not only in appeals from the District to the Circuit Court, but in the Supreme Court also.*(p)*

The Circuit Court may grant amendments, in the various causes that come before them by appeal: they will grant them in informations *in rem*: and such informations are not criminal proceedings.*(q)* The 22d section of the act of September 24th, 1789, allowing amendments, extends as well to the exercise of the appellate, as the original jurisdiction of the Circuit Court.*(r)* And an amendment will be allowed, though it introduce a new count, containing a new substantive offence: or though it may affect sureties. But not if the statute of limitations has run against it.*(s)*

(l) United States v. Wonson. 1 Gall. 5.

(m) M'Lellan v. United States. 1 Gall. 227. See ib. 149.

(n) United States v. Wonson. 1 Gall. 5. The San Pedro.
2 Wheat. 132. Yeaton v. The United States. 5 Cranch, 280.
3 Dall. 88. 113. 1 Gall. 24.

(o) Yeaton v. The United States. 5 Cranch, 280.

(p) Ib. see *ante*, 43.

(q) Anon. 1 Gall. 22, and cases cited.

(r) Ib. See *ante*, 50, 51. 83.

(s) Schooner Harmony. 1 Gall. 123.

But the Circuit Court can sustain an appeal, in an admiralty and maritime cause, only from the final decree of the District Court. If such decree be not appealed from, no appeal lies upon the subsequent proceedings of the District Court, on the summary judgment rendered in a bond for the appraised value, or upon an admiralty stipulation, taken in the cause. Such proceedings, and the awarding of execution by the District Court, are incidents exclusively belonging to it. If the decree is appealed from, the bond follows the cause into the Circuit Court, and on affirmance, may be there enforced.^(t)

By an appeal from the District to the Circuit Court, the latter becomes possessed of the cause, and executes its own judgment, without any intervention of the former. The property, or its proceeds in proceedings *in rem*, follow the appeal into the Circuit Court, and are subject to its order alone. But if a further appeal take place, to the Supreme Court, the property, or its proceeds remain in the Circuit Court; because the Supreme Court does not execute its own judgments, but sends a special mandate to the Circuit Court. After appeal from the District to the Circuit Court, the District Court can make no order for the disposition of the property.^(u) After affirmance by the Supreme Court, and remanding for final proceedings, the Circuit Court may make orders as to the disposition of the property remaining in the Circuit Court, on application by petition.^(x)

The act of September 24th, 1789, sect. 23, provides, that until the expiration of ten days, (Sundays

(t) Brig Hollen and cargo. Mason, 431. *M'Lellan v. The United States*. 1 Gall. 227.

(u) *The Collector*. 6 Wheat. 194. *The Grotius*. 1 Gall. 503, where the inconveniences of the rule are stated. See *Jennings v. Carson*. 4 Cranch, 2.

(x) *The St. Lawrence*. 2 Gall. 19.

exclusive,) after rendering judgment or passing a decree, execution shall not issue in any case where a writ of error may be a *supersedeas*, in order to give time to take out a writ of error.

The 30th section of the act of September 24, 1789, after directing that the mode of proof, by oral testimony and examination of witnesses in open Court, shall be the same in all the Courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law, and prescribing the terms and notification as to taking depositions in civil causes, enacts, that in causes of admiralty or maritime jurisdiction, or other cases of seizure, when a libel shall be filed, in which an adverse party is not named, and depositions of witnesses circumstanced as aforesaid shall be taken, before a claim be put in, the like notification as aforesaid shall be given, to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant.(y) And also, that in the trial of any cause of admiralty and maritime jurisdiction, in a District Court, the decree in which may be appealed from, if either party shall suggest to, and satisfy the Court, that probably it will not be in his power to produce the witnesses there testifying, before the Circuit Court, should an appeal be had, and shall move that their testimony may be taken down in writing, it shall be so done by the clerk of the Court: and if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the Court, which shall try the appeal, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the Court is sitting, or that by reason of age, sickness,

(y) See the whole section, *post*. Circuit Court—Practice.

bodily infirmity, or imprisonment, they are unable to travel and appear at Court ; but not otherwise.(z)

If the civil authority at a foreign place prevent the execution of a commission, directed to commissioners there in the usual form, to take the depositions of witnesses, issued out of the District Court, the Circuit Court, after appeal, will issue letters rogatory, according to the form and practice of the civil law, and, if executed, the deposition may be read in evidence.(a) On depositions so taken, it seems, some relaxation of the ordinary rule, requiring a strict performance of the duty assigned to the commissioners, and of the ordinary rules of evidence will be allowed.(b)

3. By *certiorari*, *procedendo*, &c.

No act of Congress authorises a Circuit Court to issue a *certiorari*, or compulsory process to the District Court, to remove a cause before final judgment or decree. Where, therefore, the Circuit Court, in an action of debt instituted in the District Court, on a bond, in which a declaration was filed, and appearance entered, and defence taken, issued a *certiorari*, in pursuance of which the proceedings were removed to the Circuit Court, it was held, that the District Court might have refused obedience to the writ, and either party might have moved the Court for a *procedendo*, or might have pursued the cause in the District Court, notwithstanding the writ.

But if, instead of taking advantage of the irregularity, at the proper time, and in a proper manner, the defendant makes defence, and pleads to issue, it is too late after verdict to object. The suit will be

(z) See *ante*.

(a) *Nelson v. The United States*. 1 Pet. 237.

(b) *Ib.* See the form, and also Hall's Practice and Jurisdiction of the Admiralty Courts, 37 to 43.

considered as an original one in the Circuit Court, made so by consent of parties, and that, although no new declaration be filed ; for the declaration sent from the District Court will be considered, in such case, in the same light.(c)

(c) Patterson v. The United States. 2 Wheat. 221.

CHAPTER XVIII.

CIRCUIT COURT—PRACTICE.

THE 14th section of the act of September 24th, 1789, provides, that all the Courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

By the principles and usages of law here referred to, are to be understood, those general principles, and those general usages, which are to be found, not in the legislative acts of any particular State, but in that generally recognised and long established law, (the common law,) which forms the *substratum* of the laws of every State.^(a) This section gives the Court power in a criminal case, to devise the process for bringing any person before it, who has committed an offence of which it has cognisance, and does not refer the Court to the State law for that purpose.

By the 17th section of the same act, all the Courts of the United States shall have power, to make and establish all necessary rules for the orderly conducting business in the said Courts, provided such rules are not repugnant to the laws of the United States.

By the act of May 8th, 1792, sect. 1, all writs and processes issuing from the Circuit Court, shall bear

(a) Per MARSHALL C. J. *United States v. Burr*, Appendix, 2d part, 186.

teste of the Chief Justice of the Supreme Court, (or if that office shall be vacant,) of the Associate Justice next in precedence : which said writs and processes shall be under the seal of the Court from whence they issue, and signed by the clerk thereof. The seals shall be provided at the expense of the United States.(b) By sect. 2, the forms of writs, executions and other process, except their style, and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said Court in pursuance of the act of 29th September, 1789, except so far as may have been provided for by the act of 24th September, 1789, subject however to such alterations and additions as the said Court shall in its discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule, to prescribe to any Circuit Court concerning the same : *provided*, that on judgments in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance. By the act of March 2d, 1793, sect. 7, it shall be lawful for the several Courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective Courts, directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in the vacation. And otherwise, in a manner not repugnant to the laws of the United States. to regulate the practice of the said Courts respectively, as shall be fit and necessary to the advance of justice, and especially to that end to prevent delays in proceedings.

(b) See *ante*, 20, 21.

The act of September 24, 1789, sect. 17, gives power to all the Courts of the United States, to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said Courts, all contempts of authority, in any case or hearing before the same.(c)

Where by the laws and practice of a State, the Court, on a judgment by default, might assess the damages, the Circuit Court there may do the same.(d) So where by the local laws and practice of a State, questions of fact in civil cases were tried by the Court, unless either of the parties demanded a jury, the interest upon an original judgment in another State, on which the present suit is brought, may be computed and make a part of the judgment in the present suit, without a writ of enquiry and the intervention of a jury.(e)

As however at an early period after the organization of the Courts of the United States, the Judges of the Circuit Courts had, by a rule, adopted the practice of the State Courts, at a time when the English practice prevailed, they will not now depart from it in a special case, because the State practice is changed, without first altering the general rule.(f)

Under the power given by law, the Circuit Court will not countenance the issuing of a writ inconsistent with the State practice, and the truth of the record, and operating injuriously to a party in the suit. Thus, when a *capias* had issued in the Circuit Court of the Pennsylvania district, returnable to April Term 1792, against three defendants, and only one was arrested, who gave bail, and a declaration was filed against him,

(c) See *ante*, 19, 20.

(d) *Brown v. Van Braam*. 3 Dall. 344. See *Renner v. Marshall*. 1 Wheat. 215.

(e) *Mayhew v. Thatcher*. 6 Wheat. 129.

(f) ——— *v. Craig*. 1 Peters, 1. (1803.)

on which issue was joined, and the cause was continued till August, 1796, it was held, that an *alias capias* could not be then issued against another of the three defendants, returnable to October Term 1796, bearing teste of April Term, 1792.(g) *Query*, Whether such an *alias* would be good, if regularly taken out, returnable to the succeeding term, and continued from term to term.(h)

So, in a joint action of debt against two, the plaintiff, cannot proceed to obtain a judgment against one who alone appears, until he has proceeded against the other as far as the law of the State in which the Circuit Court sits will authorise, unless the law also dispenses with the necessity of proceeding against the other defendant beyond a certain point, to force an appearance. Thus, in Pennsylvania, if the sheriff return *non est inventus* as to one defendant, the plaintiff may proceed against the other on whom the writ was served, stating in his declaration the return of the writ as to his companion. But in Virginia, the plaintiff in such case may take out an *alias* and *pluries* or *testatum capias*, or, at his election an attachment against the estate of the defendant, or upon the return of a *pluries* not found, the Court may order a proclamation to issue, warning the defendant, to appear on a certain day, and if he fail to do so, judgment by default may be entered against him. Or, if the other defendant be no inhabitant of Virginia, and the sheriff so return, the law would have abated the writ as to him and proceedings might go on as to the other. But where neither course is pursued a judgment obtained against the one is irregular.(i)

But it is not every practice existing in the State Courts at the passage of the act of May 8th, 1792, that is embraced by that act. Thus, under the process of

(g) United States v. Parker et al. 3 Dall. 373.

(h) Ib.

(i) Barton v. Pettit and Bayard. 7 Cranch, 194. See ante, 111.

attachment issued by the practice of the Courts of Connecticut, their acts of assembly required a *mittimus*, previous to the officer's committing the party to prison. But it was held, where an attachment issued out of the District Court of the United States in that State, directing the marshal, in default of estate, to arrest the party, and him safely keep, he might commit him to prison, as a proper mode of safe keeping, without a *mittimus* : that being considered as not adopted by the acts of Congress, but as a peculiar municipal regulation, affecting the State officers only. (k)

Operation of the State laws.

The 34th section of the act of 24th September, 1789, provides, that the laws of the several States, except where the Constitution or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply.

It seems, that this section is confined to civil proceedings, and that the laws of the several States are not to be regarded as rules of decision in trials for offences against the United States; and that the words, "trials at common law" apply to civil suits, as contradistinguished from criminal prosecutions, as well as to suits at common law, as contradistinguished from those which come before the Court, sitting as a Court of Equity or Admiralty. (l)

In cases depending on the acts of the Legislature of a State, and in construing those acts, especially in questions respecting titles to land, the Courts of the United States are governed by the construction, adopted by the State tribunals, when that construction is

(k) *Palmer v. Allen*. 7 Cranch, 350.

(l) *United States v. Burr*, Appendix, 2d part, 185.

settled and ascertained.^(m) But though the State laws as to rights, furnish rules of decision for the Courts of the United States, under certain qualifications, yet as to remedies they have no binding force: and that this is every day's practice.⁽ⁿ⁾ Thus, as in some States, there is no Court of Equity, and in some of these States, Courts of law recognise and enforce equity principles, and in others, all equitable claims are regarded as mere nullities at law, a construction that would adopt the State practice in all its extent, would extinguish, in some States. the exercise of equitable jurisdiction. The remedies, therefore, in the Courts of the United States at common law and in equity, are to be, not according to the practice of the State Courts, but according to the principles of common law and equity, as distinguished and defined in the English code.^(o) So, where the State in which the Circuit Court is, has no chancery, and the case is proper for a Court of Chancery to enforce an account and take an account. though by the State laws a suit may be sustained by peculiar process, still, if the remedy in Chancery is more complete, it may be obtained in the Circuit Court in equity.^(p) Where, however, the statutes of a State, recognise an equitable title as a legal one, or declare a title which otherwise would be a legal one. void, under certain equitable circumstances, in both these cases, the question of title is a legal question, and may be entertained in a suit at law in the Courts of the United States, as fully as it would be in a State Court. But though such question be a legal one, yet, if the question arise, not under the laws of

^(m) Polk v. Wendell. 9 Cranch, 98. Thatcher v. Powell. 5 Wheat. 119.

⁽ⁿ⁾ Campbell v. Claudius. 1 Pet. 494. See Bail, *post*. See United States v. Wonson. 1 Gall. 18.

^(o) Robinson v. Campbell. 3 Wheat. 221.

^(p) United States v. Howland. 4 Wheat. 108.

such State, but of another, under which it is a mere equitable question, it cannot be entertained in a Court of common law of the United States.^(q) The Circuit Courts of the United States have a Chancery jurisdiction in every State, and the same Chancery powers and rule of decision.^(r)

Although the rules of practice in the Circuit Court, conform to the State practice, as it existed at the passage of the act of September 24th, 1789, and not to the practice as it may since have been altered in the State Courts, it is not so as to the operation of State laws, as rules of decision under the 34th section: for the State laws passed from time to time since then, are embraced by this section, as well as those which were in force at that period. Indeed, Congress cannot constitutionally impair the obligation of laws passed by the States, by setting up a different rule of decision in relation to contracts, property real and personal, &c., when such State laws are not repugnant to the Constitution and laws of the United States. The powers vested in Congress are limited, and were not intended, nor can they be construed, to interfere with these powers, as vested in the State governments.^(s)

Service of process.

By the 27th section of the act of September 24th, 1789, the Marshal is to execute, throughout the district, all lawful precepts directed to him and issued under the authority of the United States, and power is given to him to command all necessary assistance in the execution of his duty, and to appoint one or more deputies.^(t)

^(q) United States v. Howland. 4 Wheat. 115.

^(r) Ib.

^(s) Golden v. Prince. 5 Hall's Law Journ. 502.

^(t) See Marshal, *post*.

Affidavits and Bail.

By the 10th section of the act of May 8, 1792, it shall and may be lawful for the clerks of the District and Circuit Courts, in the absence or in case of the disability of the Judges, to take recognisances of special bail *de bene esse*, in any action depending in either of the said Courts. And by the 1st section of the act of February 20th, 1812, it shall be lawful for the Circuit Court of the United States to be holden in any district in which the present provision by law for taking bail and affidavits in civil causes (in cases where such affidavits are by law admissible) is inadequate, or, on account of the extent of such district inconvenient, to appoint such and so many discreet persons in different parts of the district as such Court shall deem necessary to take acknowledgements of bail and affidavits; which acknowledgments of bail and affidavits shall have the like force and effect, as if taken before any Judge of said Court; and any person swearing falsely in and by any such affidavit, shall be liable to the same punishment as if the same affidavit had been made or taken before a Judge of said Court. And by the 2d section, the like fees shall be allowed for taking such bail and affidavit, as are allowed for the like services by the laws of the State in which any such affidavit or bail shall be taken.

In respect to the effect given by the Circuit Court to discharges under State insolvent laws, and how far they will discharge on common bail, it seems, a discharge on common bail will be allowed, where the party is discharged by the insolvent law of the State where the debt was contracted, or made payable, and the plaintiff had notice of the defendants intention to take the benefit of the law, and was an assignee under it. Thus, where the debt was contracted in Pennsylvania, and the defendant was there discharged under the in-

solvent law, notice being given to the plaintiff, of the defendant's intention to take the benefit of the law, and the plaintiff being an assignee of the defendant's effects under the law, the Court, on motion, in a suit brought in the Pennsylvania district, discharged the defendant on common bail.^(u) But where the debt is contracted and payable beyond seas, and the plaintiffs are residents beyond seas, the defendant will not be entitled to appear on common bail by virtue of a discharge under a State insolvent law.^(x) And it seems, in general, that a discharge on common bail will not be directed by the Circuit Court, on the ground of a discharge under an insolvent law of a country where the parties do not reside, and in which the contract was not made, or to be performed. The Courts of the State where the discharge is given may be bound to discharge on common bail, no matter where the debt was contracted; but the Courts of the United States, or of other States, are under no such obligation, and they ought not, on the ground of comity, to give it effect in their Courts.^(y) A discharge therefore in Maryland, of a debt contracted in Virginia, will not be regarded in a suit in a Circuit Court of Virginia.^(z)

By the act of March 2d, 1799, sect. 1, in all cases where a defendant, who hath procured bail to respond to the judgment in a suit brought against him in any of the Courts of the United States, shall afterwards be arrested in any district of the United States, other than that in which the first suit was brought, and shall be committed to a goal, the use of which shall have been ceded to the United States for the custody of prisoners, it

(u) *Read v. Chapman*. 1 Pet. 404. 484.

(x) *Campbell v. Claudius*. 1 Pet. 484.

(y) *Ib.* *Banks v. Greenleaf*, cited. *Ib.* See also *Bankrupt Law*, *post*.

(z) *Banks v. Greenleaf*, cited. 1 Pet. 74. 484. See *Hayton v. Wilkinson*. 1 Hall's Law Journ. 260. *Gill v. Jacobs*. 6 Hall's Law Journ. 117.

shall be lawful for, and the duty of any Judge of the Court, in which the suit is depending, wherein such defendant hath procured bail as aforesaid, at the request, and for the indemnification of the bail, to order and direct, that such defendant be held in the gaol to which he shall have been committed a prisoner, in the custody of the marshal within whose district such gaol is ; and, upon the said order duly authenticated being delivered to the said marshal, it shall be his duty to receive such prisoner into his custody, and him safely to keep, and the marshal shall be thereupon chargeable as in other cases for an escape. And the said marshal, thereupon shall make a certificate, under his hand and seal, of such commitment, and transmit the same to the Court from which such order issued, and shall also, if required, make a duplicate thereof, and deliver the same to such bail, his, or their agent, or attorney. And, upon the said certificate being returned to the Court which made the said order, it shall be lawful for the said Court, or any Judge thereof, to direct, that an *exoneretur* be entered upon the bail piece, where special bail shall have been found, or otherwise to discharge such bail. And such bail shall, thereupon, accordingly be discharged. Sect. 2, enacts, that, the marshal, or his deputy, serving such order as aforesaid, shall therefor receive the same fees and allowances as for the service of an original process, commitment thereon to the gaol, and return thereof. Sect. 3, enacts, that in every case of commitment as aforesaid, by virtue of such order, the person so committed shall, unless sooner discharged by law, be holden in gaol until final judgment shall be rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment shall be rendered against him, that he may be charged in execution, which may be directed to, and served by the marshal in whose custody he is. *Provided always*, that nothing in this

act contained shall affect any case wherein bail has been already given.

The marshal, however, is not liable for the escape of a prisoner from the custody of the keeper of a State gaol, to which he had committed him under process, the use of such gaol having been ceded to the United States by an act of assembly, in pursuance of the resolution of Congress of the 23d September, 1789. Such keeper is neither in fact nor law the deputy of the marshal: nor is such prisoner in the custody of the marshal, or controlable by him. The keeper becomes responsible, and may make himself liable to the pains and penalties of the law.(a)

It seem, the Circuit Court has no authority to issue a *habeas corpus* to bring up a defendant who is confined in a State gaol by civil process under State authority in order to surrender him in the Circuit Court in discharge of his bail, who were bound in recognisance in the Circuit for his appearance there; nor will they discharge the defendant from his recognisance.(b)

Appearance.

The appearance of the defendant by attorney, cures all irregularity of process. A deputy marshal, therefore, cannot appear, and craveoyer of the writ, and plead in abatement that the writ was not directed to a disinterested person &c., as directed by the 28th section of the act of 1789. It seems, however, he might appear in *propria persona*, and directly plead in abatement.(c)

(a) *Randolph v. Donaldson*. 9 Cranch, 76.

(b) *United States v. French*. 1 Gall. 1.

(c) *Knox v. Summers*. 3 Cranch, 496. See *ante*, 76. 119.

Consolidation.

The act of 22d July, 1818, provides, that whenever causes of like nature or relative to the same question shall be pending before a Court of the United States or of the Territories thereof, it shall be lawful for the Court to make such orders and rules concerning proceedings therein, as may be conformable to the principles and usages belonging to the Courts, for avoiding unnecessary costs or delay in the administration of justice: and accordingly, causes may be consolidated as to the Court shall appear reasonable.(d)

Money paid into Court.

By the act of March 3d, 1817, sect. 1, it shall be the duty of the Judges of the Circuit and District Courts of the United States, within sixty days from and after the passing of this act, in all districts in which a branch of the Bank of the United States is or shall be established, to cause and direct all moneys remaining in said Courts respectively, or being subject to the order thereof, to be deposited in said branch bank, in the name and to the credit of the Court, and a certificate thereof from the cashier of said bank, stating the amount and time of such deposit to be transmitted within twenty days thereafter to the Secretary of the Treasury. And in districts in which no such branch is or shall be established, such deposits shall be made in like manner, and within the same time in some incorporated State bank, and a certificate thereof in like manner and within the said time as aforesaid, transmitted to the Secretary of the Treasury. By sect. 2, all moneys which shall be hereafter paid into said Courts or received by the officers thereof, in cases pending therein, shall be immediately deposited in the branch

(d) See Costs, *post*.

bank within the district if there be one, otherwise in some incorporated State bank within the district in the name and to the credit of the Court. By sect. 3, no money deposited as aforesaid shall be drawn from said banks except by order of the Judge or Judges of the said Courts respectively in term or in vacation, to be signed by such Judge or Judges, and to be entered and certified of record by the clerk: and every such order to state the cause in, or on account of which it is drawn. By sect. 4, if any clerk of such Court, or other officer thereof having received any such moneys as aforesaid shall refuse or neglect to obey the order, of such Court, such clerk or other officer shall be forthwith proceeded against by attachment for contempt. And by sect. 5, at each regular and stated session of said Court, the clerks thereof shall present an account to said Court, of all moneys remaining therein or subject to the order thereof, stating particularly on account of what causes said moneys are deposited, which account and the vouchers thereof shall be filed in Court. *Provided nevertheless*, that if in any district there shall be no branch of the bank of the United States, nor any incorporated State bank, the Courts may direct moneys to be deposited according to their discretion as heretofore.

Money deposited in a bank under a decree of the Court, and subject to its order, is "money deposited in Court," within the meaning of the act of March 1st, 1793, sect. 2, as much so as if in the possession of an officer of the Court: the clerk is therefore entitled to the commission of one and a quarter per cent. allowed by that act in such case in admiralty proceedings.^(c)

If money proceeding from the sale of a vessel and cargo condemned as prize by the Circuit Court, be paid

(c) Ex parte Prescott. 2 Gall. 146, decided in 1814.

into bank to the credit of the Circuit Court, the District Judge cannot in vacation order it to be drawn out and distribute it: and if he does, the Circuit Court will on motion grant a rule upon the persons receiving the money under such order, to return the same to Court, or on failure, that an attachment shall issue.(f)

Judgment by default, &c. on Specialty.

By sect. 26, of the act of September 24th, 1789, in all causes before either of the Courts of the United States, to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty; where the forfeiture, breach, or non-performance shall appear by the default or confession of the defendant, or upon demurrer, the Court before whom the action is shall render judgment therein for the plaintiff, to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.

Notice to produce Books or Writings.

The 15th section of the act of September 24th, 1789, provides, that all the said Courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in Chancery. And if a plaintiff shall fail to comply with such order to produce books or writings, it shall be lawful for the Courts respectively, on motion, to give the like

(f) The Ariadne. 1 Pet. 455.

judgment for the defendant as in cases of nonsuit. And if a defendant shall fail to comply with such order to produce books or writings, it shall be lawful for the Courts respectively, on motion as aforesaid, to give judgment against him or her by default.

This provision was intended to prevent the necessity of instituting suits in equity, merely to obtain from an adverse party the production of deeds and papers relative to the litigated issue. The act does not designate to whom the notice shall be given, whether the party himself, or his attorney. But the Court will always keep the cause under its controul for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, the notice is served on an attorney whose client lives at a great distance, this will always be deemed a sufficient reason to postpone the trial, till a full opportunity has been afforded for the attorney's communicating the rule to the client. If, likewise, the Court find that the deeds are actually on record, they will not indulge the party with a rule for producing them merely as a cheap mode of procuring evidence. If the originals are necessary, for a special reason, that reason must be assigned to the Court. Therefore, where the defendant's counsel offered to refer the other party to the pages where the deeds were recorded, to produce which notice had been given to the defendant's attorney, the Court declared, that put an end to the matter: but added, that if it were not satisfactorily done, they would not allow the cause to be brought to trial.(g)

Subpœnas and Witnesses.

The 6th section of the act of March 2d, 1798, enacts, that subpœnas for witnesses, who may be re-

(g) *Geyger's lessee v. Geyger.* 2 Dall. 332.

quired to attend a Court of the United States, in any district thereof, may run into any other district: *provided*, that in civil causes the witnesses living out of the district in which the Court is holden, do not live at a greater distance than one hundred miles from the place of holding the same. By the 6th section of the act of February 28th, 1799, the compensation to witnesses in the Courts of the United States shall be as follows, to wit: to the witnesses summoned in any Court of the United States, the same allowance as is provided for jurors, namely, to each witness, for each day he shall attend in Court, one dollar and seventy-five cents, and for travelling, at the rate of five cents per mile, from their respective places of abode to the place where the Court is holden, and the like allowance for returning.

Where, on a motion to postpone the trial, it was suggested on behalf of the defendant, in an indictment for a misdemeanor, as an excuse for the non attendance of witnesses, who had been subpœnaed to attend the Circuit Court, that they were Associate Judges of the Court of Common Pleas of a State, and were attending the Judges of the Supreme Court, then holding a Court of *Nisi Prius* in the County, PATERSON J. said, we pay no respect to persons; the law operates equally upon all, the high and low, the rich and poor. If we issue a subpœna to a Justice or Judge, and it is not obeyed, we should be more strict in our proceedings against them than others, whose office did not so strongly point out their duty.^(h) So where the defendant was indicted for a libel on the President, and applied to the Court for a letter to be addressed by them to several members of Congress, (which was then in session), requesting their attendance as witnesses on his behalf, and the practice in Pennsylvania to

(h) United States v. Caldwell. 2 Dall. 333, *note*.

that effect, in relation to members of assembly, was referred to. CHASE J. refused it, on the ground, that members of Congress were not exempted from the obligation to obey a *subpœna*. Whether an attachment could issue for non attendance pursuant to it, was not decided. PETERS J. was for agreeing to the motion, on the ground of the Pennsylvania practice, but it was refused.⁽ⁱ⁾ In another case, a subpœna had been served on Mr. Madison then Secretary of State of the United States and others, to appear and testify on behalf of the defendant, and they did not attend. A tender had been made to Mr. Madison, at the time of serving the *subpœna* for his expenses, and on motion for an attachment against him, the opinions of the Judges of the Circuit Court, (PATERSON and TALMADGE) were opposed. One of them being of opinion, that the absent witness should be laid under a rule to shew cause, why an attachment should not be issued against him. The other Judge was of opinion, that neither an attachment in the first instance, nor a rule to shew cause, ought to be granted.^(k) It is to be observed, that on a motion for postponement of trial previously decided, in which the Court required the defendant to state the facts which these witnesses were to prove, the Court were of opinion that their evidence was not material: and that Mr. Madison, and two others, heads of departments, offered to give their testimony on a commission if issued by consent.^(l) So, on a rule upon the defendant the Secretary of State, to shew cause why a *mandamus* should not issue against him, commanding him to cause to be delivered to the plaintiffs, their several commissions of Justices of the peace in the District of Colum-

(i) United States v. Cooper. 4 Dall. 341.

(k) United States v. Smith and Ogden.

(l) See however, United States v. Burr, 184, remarks upon this case.

bia, the Court ordered the clerks in the office of the Secretary of State, who had been summoned to attend the Court. and who had declined giving a voluntary affidavit, to be sworn, and their answers taken in writing as to the commissions having existed, but informed them that when the questions were asked they might state their objections to answering each particular question if they had any.(m) The Court also thought that Mr. Lincoln, who was at the time when the transaction happened, acting as Secretary of State, ought to answer questions, as to the fact whether such commissions had been in the office or not : a fact which all the world had a right to know. But he was not bound to disclose any thing communicated to him in confidence, nor which would criminate himself.(n) So it seems, a *subpœna* may issue to procure the attendance of the President, on behalf of a defendant, charged with a crime.(o)

A *subpœna duces tecum* ought to issue if there exist any reason for supposing that the evidence may be material, and ought to be admitted;(p) and a *subpœna duces tecum* may issue on behalf of a person who stands charged with an offence directed to the President of the United States, to compel the production of a letter addressed to him, and his answer thereto, if it appear by a general affidavit of the person charged, that the testimony may be material for him, and the Court be of opinion it is desired for the real purpose of defence.(q) For where the *subpœna duces tecum* is to be issued to those who administer the government of this country, such an affidavit is required, as will furnish probable cause to believe, that the testimony is

(m) *Marbury v. Madison*. 1 Cranch, 137.

(n) *Ib.*

(o) *United States v. Burr*, 177. 189.

(p) *Ib.* 116.

desired for the real purpose of defence.(q) To obtain the production of orders issued to the land and naval officers of the United States by the President, the *subpæna duces tecum* should be directed to the heads of the departments in whose custody the orders are.(r) Copies of such documents, certified under the act of Congress, would not be sufficient: the party is entitled to the original.(s) So, a *subpæna duces tecum* may issue to the Attorney General of the United States, for a paper in his possession.(t) Letters addressed to the President, are most usually retained by himself, and do not belong to any of the heads of departments.(u) If such papers contain any thing not essential to the defence and requiring concealment, that must appear on the return of the *subpæna*.(x)

An attachment will not be granted against non-attending witnesses, though material, who have not been *subpænaed* in the cause in which it is applied for, though they were *subpænaed* in other causes to the same term.(y)

It seems, that unfair practices towards a witness who was to give testimony in the Circuit Court, or oppression under colour of its process, though acted in another district, would be punishable by attachment, (after a rule to shew cause), provided the person, who had acted therein, came within the jurisdiction of the Court.(z) And an attachment for not attending pursuant to a *subpæna*, must be served by the marshal,

(q) United States v. Burr.

(r) Ib. 179, 180.

(s) Ib. 187.

(t) Ib.

(u) United States v. Burr. 187.

(x) Ib. 188.

(y) United States v. Caldwell. 2 Dall. 333.

(z) United States v. Burr. 365.

as it is the process of the Court, regularly issuing for the administration of justice.(a)

The Circuit Court will discharge a witness attending on *subpœna*, from arrest made under process from a State Court.(b)

Death of party.

The 31st section of the act of September 24th, 1789, declares, that where any suit shall be depending in any Court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party, who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive shall have full power to prosecute or defend any such suit or action until final judgment. And the defendant or defendants, are hereby obliged to answer thereto accordingly, and the Court, before whom such cause may be depending, is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the Court where such suit is depending, twenty days before hand, shall neglect or refuse to become a party to the suit, the Court may render judgment against the estate of the deceased party, in the same manner, as if the executor or administrator had voluntarily made himself a party to the suit. And the executor or administrator, who shall become a party to the suit, as aforesaid, shall, upon motion to the Court where such suit is depending, be entitled to a continuance of the same, until the next term of the

(a) United States v. Burr, 365.

(b) Hurst's case 4 Dall. 387. See act of 1789, sect. 17, Authority to administer oaths, and punish for contempts.

said Court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not abate, but such death being suggested upon the record, the action shall proceed, at the suit of the surviving plaintiff or plaintiffs, against the surviving defendant or defendants.

In case of the death of parties before judgment, all personal actions, by the common law abated; and it required the aid of some statute, like the foregoing section, to enable the action to be prosecuted by, or against, the personal representative of the deceased, when the cause of action survived. In real actions, the like principle prevailed for a still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up, and the plea is not, therefore, in the same condition as it was, in the life time of the party.(c)

This statute embraces all cases of death before final judgment, and, of course, is more extensive than the statutes of 17 Car. 2, and 8 and 9 W. 3. The death may happen before, or after plea pleaded, before or after issue joined, before or after verdict, or before or after interlocutory judgment: and in all these cases, the proceedings are to be exactly as if the executor or administrator were a voluntary party to the suit.(d)

The executor or administrator may come in *instanter*, voluntarily, and, in such case, a *scire facias* is not necessary. It is done on motion, by order of the Court, and he may immediately proceed to trial, though, if he pleases, he may have one continuance. The other party is not entitled to a continuance in

(c) *Green v. Watkins.* 6 Wheat. 262.

(d) *Hatch v. Eustis.* 1 Gall. 164.

such case, nor to any delay.(e) But the other party may insist on the production of his letters testamentary, before the order of the Court permitting him to be a party: if, however, the order be made, it is then too late for the opposite party to contest the fact of his being executor, or to require oyer of the letters testamentary, unless it has taken place improperly, and by surprise on the Court.(f)

If the administratrix of the plaintiff, in whose name the suit had been revived by *scire facias*, upon the death of the intestate after issue joined, intermarry, and such intermarriage be pleaded *puis darrien continuance*, the *scire facias* is thereby abated, but not the original suit, and a new *scire facias* may issue, under the above section, to revive the original suit, in the name of the husband and administratrix, as the personal representatives of the intestate, in order to enable her to prosecute the suit to final judgment.(g)

If the defendant die after verdict for the plaintiff, but before final judgment, and his administrator become a party, and judgment is rendered against him, and execution issue thereon, which is returned unsatisfied, on *scire facias* against the administrator, he may plead *plene administravit*, no assets, or insolvency of the intestate.(h) It seems, that execution could not regularly issue till after judgment on the second *scire facias*.(i)

But, as the foregoing section of the act of 24th September, 1789, is confined to personal actions, the power to prosecute and defend being given to the executor or administrator of the deceased party, and not to the heir or devisee, the death of either party

(e) *Wilson v. Codman's executors.* 3 Cranch, 193.

(f) *Ib.*

(g) *M'Coul v. Lecamp.* 2 Wheat. 111.

(h) *Hatch v. Eustis.* 1 Gall. 160.

(i) *Ib.*

before judgment, in a real action, abates the suit. It was, therefore, held, that if the defendant in a writ of right die after a summons served upon him, without having appeared to the suit, the action cannot be revived as to the heirs of the defendant, by rule of Court, and order thereon : and that if this be done, a judgment taken against the heirs by default will be reversed, on error brought.(j)

Juries.

By the 29th section of the act of September 24th, 1789, jurors in all cases, to serve in the Courts of the United States, shall be designated by lot, or otherwise, in each State respectively, according to the mode of forming juries therein *now* practised, so far as the laws of the same shall render such designation practicable by the Courts, or marshals of the United States. And the jurors shall have the same qualifications, as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest Courts of law of such State, and shall be returned, as there shall be occasion for them, from such parts of the district, from time to time, as the Court shall direct, so as shall be most favourable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services. And writs of *venire facias*, when directed by the Court, shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or, in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the Court shall especially appoint for that purpose, to whom they shall administer an oath or affirmation,

(j) Macker's heirs v. Thomas. 7 Wheat. 530.

that he will *truly and impartially serve and return such writ*. And when, from challenges or otherwise, there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the Court where such defect of jurors shall happen, return jurymen *de talibus circumstantibus*, sufficient to complete the pannel, and when the marshal or his deputy are disqualified, as aforesaid, jurors may be returned by such disinterested person as the Court may appoint. By the 6th section of the act of February 28th, 1799, the compensation to jurors in the Courts of the United States shall be as follows, to wit: to each grand, and other juror, for each day he shall attend in Court, one dollar and twenty-five cents: and for travelling, at the rate of five cents per mile, from their respective places of abode, to the place where the Court is holden, and the like allowance for returning. This act applies to juries in civil cases, as well as in criminal.^(k) By the act of May 13th, 1800, sect. 1, jurors to serve in the Courts of the United States, shall be designated by lot or otherwise, in each State or district respectively, according to the mode of forming juries to serve in the highest Courts of law therein, *now* practised, so far as the same shall render such designation practicable by the Courts and marshals of the United States. But, by the 30th section of the act of April 29th, 1802, no special juries shall be returned by the clerks of any of the said Circuit Courts: but in all cases, in which it was the duty of the said clerks to return special juries, before the passing of that act, it shall be the duty of the marshal for the district where such Circuit Court may be held, to return special juries, in the same manner and form, as by the laws of the respective States the said clerks were required to return the same.

(k) Ex parte Lewis and others. 4 Cranch, 443.

In a suit for land, in which the defendant pleads that the land lies in another State, the Court of which has jurisdiction, and issue is joined on this plea to the jurisdiction, it is not a good cause of challenge to the array, that the marshal, who returned the jury, is a citizen of the State in which the suit is brought. But if the jury be arrayed by a deputy marshal, who is interested in the same tract of land for part of which the action is brought, under colour of the same title as the plaintiff's, the Court will quash the array.(l)

On a proceeding by petition, in which the petitioners claimed their freedom, a juror being challenged for favour, on examination before the triers, appeared to have formed and expressed no particular opinion on the case, but, on being questioned further, avowed his detestation of slavery to be such, that in a doubtful case he would find a verdict for the plaintiffs, and that he had so expressed himself in regard to this cause, and added, that if the testimony were equal, he should certainly find a verdict for the petitioners. The Court instructed the triers, that he did not stand indifferent : and it was held, that the Court exercised a sound discretion, in not permitting the juror to be sworn.(m)

It seems, the alienage of a juror, in a civil cause in the Circuit Court, may be a cause of challenge before such juror is sworn : but advantage cannot be taken of it after verdict.(n)

Under the 29th section of the act of September 24th, 1789, the Court may award a *tales*, for a special as well as a common jury.(o) But an exception to the qualification of a *talisman*, as a juror, on the ground of his not being an inhabitant of the County, must be taken

(l) *Fowler v. Lindsey*. 3 Dall. 411.

(m) *Mima and child v. Hepburn*. 7 Cranch, 290.

(n) *Hollingsworth v. Duane*. 4 Dall. 354.

(o) *Anon.* 2 Dall. 382.

before he is sworn on the jury. It is too late afterwards. (p)

Evidence and Depositions.

The 30th section of the act of September 24th, 1789, provides, that the mode of proof by oral testimony, and examination of witnesses in open Court, shall be the same in all the Courts of the United States, as well in the trial of causes, in equity, and of admiralty and maritime jurisdiction, as of actions at common law. And, when the testimony of any person shall be necessary in any civil cause, depending in any district, in any Court of the United States, who shall live at a greater distance than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, or is ancient, or very infirm; the deposition of such person may be taken *de bene esse*, before any Justice or Judge of any of the Courts of the United States, or before any Chancellor, Justice, or Judge of a Supreme or Superior Court, Mayor, or Chief Magistrate of a city, or Judge of a County Court, or Court of Common Pleas, of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause: *provided*, that a notification from the magistrate, before whom the deposition is to be taken, to the adverse party, to be present at the taking of the same, and to put interrogatories if he think fit, be first made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclu-

(p) *Mima and child v. Hepburn.* 7 Cranch, 290. See further as to *Juries, post*, Proceedings in Criminal Cases.

sive, for every twenty miles travel. And every person, deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify the *whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate, until he deliver the same with his own hand into the Court for which they are taken or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him the said magistrate sealed up, and directed to such Court, and remain under his seal, until opened in Court.

And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in open Court.

And unless it shall be made to appear, on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, that the witnesses are then dead, or gone out of the United States, or to a greater distance than as aforesaid, from the place where the Court is sitting, or that by reason, of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at Court, such depositions shall not be admitted or used in the cause.

Provided, that nothing herein shall be construed to prevent any Court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess; nor to extend to depositions taken *in perpetuam rei memoriam*, which, if they relate to matters that may be cognisable in any Court of the United States, a Circuit Court on application thereto made,

as a Court of Equity, may, according to the usages in chancery, direct to be taken.

By the act of February 20th, 1812, in any cause depending before a Court of the United States, it shall be lawful for such Court, in its discretion, to admit in evidence any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a Court of the State, wherein such cause is pending, according to the laws thereof.

By the act of 1st March, 1817, the commissioners who now are, or hereafter may be, appointed by virtue of the act of February 20th, 1812, (to take affidavits and bail in civil causes,)(*q*) shall and may exercise all the powers that a Justice or Judge of any of the Courts of the United States may exercise, by virtue of the 30th section of the act of September 24th, 1789, above-mentioned.

There are two modes of taking depositions under these acts. By the first, notice in certain cases is not necessary, but the forms prescribed must be strictly pursued. By a subsequent part of the section, depositions may be taken by *dedimus potestatem*, according to common usage. The State laws, in the latter case, are to be referred to on the subject of notice, and if they do not authorise notice to be given to the attorney at law, a deposition taken under such notice cannot be read in evidence.(*r*) And depositions taken under a *dedimus potestatem* are not, under any circumstances, considered as taken *de bene esse*, but are absolute, whether the witness reside beyond the process of the Court or within it. The 30th section of the act of September 24th, 1789, relating to depositions, is confined to those taken under its enacting part. Therefore, where a commission is issued by

(*q*) See *ante*, 152.

(*r*) *Buddicum v. Kirk.* 3 Cranch, 297.

(*s*) *Sergeant v. Biddle.* 4 Wheat. 508.

consent, both parties naming commissioners, and filing interrogatories, the depositions taken under it are evidence, though the witnesses reside only thirty-three miles from the place of holding the Court.(s)

Query, If such commission issue without consent, whether the other party is bound to object at the time, or during the term when the rule is entered, or may object afterwards.(t)

The Court has authority to allow interrogatories or commissions to be filed at any time, on shewing a proper case: but will, if the circumstances require it, order the interrogatories to be filed previous to issuing the commission, and direct otherwise specially, the manner of executing the commission.(u)

It is a sufficient execution of a commission, if all the interrogatories are substantially, though not formally answered.(x) If a commission be directed to four commissioners abroad jointly, it cannot be executed by three of them, though two of them be of the nomination of the party objecting.(y) So, where a commission was directed to five persons at Buenos Ayres, or any one of them, three of whom were nominated by the plaintiffs, and two by the defendant, and was executed by one of those persons in conjunction with the American consul, the latter of whom certified, that all the persons named in the commission but one were dead or removed, and that the commission was delivered to him, and that he convoked the remaining commissioner and the witness before him, and that the examination of the witness was taken by himself and the commissioner, the deposition was held inadmissible, because the examination was taken in conjunction

(s) *Sergeant v. Biddle.* 4 Wheat. 508.

(t) *Ib.*

(u) *Cunningham v. Otis.* 1 Gall. 166.

(x) *Nelson v. United States.* 1 Pet. 237.

(y) *Guppy v. Brown.* 4 Dall. 410.

with a person not named in the commission, who voluntarily and unnecessarily intruded himself into the business (a)

A deposition taken *de bene esse* cannot be read on the trial of a common law suit, unless it appear that the witness has been served with a *subpœna*, and from some sufficient cause cannot attend.(b)

The circumstance that the witness lives at the distance of more than one hundred miles from the place of trial, and therefore his deposition might have been taken *de bene esse*. under these acts, is not a sufficient reason for the other party to force the cause on to trial, in the absence of the witness, if he be material, has been sick, and promised to attend the trial, though the suit be ejectment, in which the verdict is not conclusive, and though the facts which the witness is to prove are not disclosed.(c)

Where a deposition, taken *de bene esse*, was opened by the clerk out of Court, supposing it to be a letter, it was held a fatal objection to its being read in evidence.(d)

If depositions have not been taken in conformity with the acts of Congress, and the rules of the Circuit Court, they cannot be read in evidence, though they were taken according to the practice prevailing in the State Courts; unless the parties expressly wave the objection, or, by previous consent, agree to have them taken, and made evidence.(e)

New Trial and Stay of Execution.

By the 17th, section of the act of September 24th, 1789, all the said Courts of the United States, (Su-

(a) *Willings v. Consequa.* 1 Pet. 309.

(b) *Browne's lessee v. Galloway.* 1 Pet. 294.

(c) *Syme's lessee v. Irvine.* 2 Dall. 383.

(d) *Beale v. Thompson.* 8 Cranch, 71.

(e) *Evans v. Eaton.* 7 Wheat. 426.

preme, Circuit and District), shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law. And by sect. 18, when in a Circuit Court, judgment upon a verdict in a civil action shall be entered, execution may on motion of either party, at the discretion of the Court, and on such conditions, for the security of the adverse party, as they may judge proper, be stayed forty two days from the time of entering judgment, to give time to file in the clerk's office of said Court a petition for a new trial. And if such petition be there filed, within said term of forty two days, with a certificate thereon, from either of the Judges of such Court, that he allows the same to be filed, which certificate he may make, or refuse, at his discretion, execution shall, of course, be further stayed, to the next session of said Court. And, if a new trial be granted, the former judgment shall be thereby rendered void.

Special Demurrer and Amendments.

The 32d section of the act of September 24th, 1789, declares, that no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any of the Courts of the United States shall be abated, arrested, quashed, or reversed, for any defect or want of form, but the said Courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only, in cases of demurrer, which the party demurring shall specially set down and express together with his demurrer as the cause thereof. And the said Courts respectively shall and

may by virtue of this act from time to time, amend all and every such imperfections, defects, and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said Courts respectively shall in their discretion and by their rules prescribe.

The Circuit Court may grant leave to amend, after a cause has been remanded by the Supreme Court for a new trial.^(e) So, after the cause has been remanded, the inferior Court may receive additional pleas, or admit any amendment in those already filed, although the Supreme Court has decided those pleas to be bad on demurrer to them.^(f) For the Supreme Court will not give directions for amendments, but leave them to the Court below.^(g)

Costs.

The 20th section of the act of September 24th, 1789, declares, that where in a Circuit Court, a plaintiff in an action originally brought there, other than the United States, recovers less than the sum or value of five hundred dollars, he shall not be allowed, but at the discretion of the Court, may be adjudged to pay costs.^(h) By the 4th section of the act of March 1st, 1793, there shall be allowed and taxed in the Supreme, Circuit, and District Courts, in favour of the parties obtaining judgments therein, such compensation for their travel, and attendance, and for attorneys, and counsellor's fees, (except in the District Courts, in cases of admiralty and maritime jurisdic-

^(e) Pollard v. Dwight. 4 Cranch, 421.

^(f) Marine Insurance Company v. Hodgson. 6 Cranch, 206.

^(g) Sheehy v. Mandeville. 6 Cranch, 253. But see *ante*, 51. 83.

^(h) See *ante*, 106.

tion.) as are allowed in the Supreme or Superior Courts of the respective States.

By the 1st section of the act of 22d July, 1813, whenever there shall be several actions, or processes, against persons who might legally be joined in one action or process, touching any demand, or matter in dispute, before a Court of the United States, or of the Territories thereof, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action, or process, unless special cause for several actions or processes shall be satisfactorily shewn on motion in open Court. By sect. 3, whenever causes of like nature, or relative to the same question, shall be pending before a Court of the United States, or of the Territories thereof, it shall be lawful for the Court to make such orders and rules, concerning proceedings therein, as may be conformable to the principles and usages belonging to Courts, for avoiding unnecessary costs or delay in the administration of justice; and accordingly, causes may be consolidated, as to the Court shall appear reasonable. And, if any attorney, proctor, or other person admitted to manage and conduct causes, in a Court of the United States, or the Territories thereof, shall appear to have multiplied the proceeding in any cause before the Court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of the Court to satisfy any excess of costs so incurred.

Executions.(i)

The act of May 8th, 1792, sect. 2, provides, that the forms of executions and other process in suits at common law, except their style, shall be the same as were then used in pursuance of the act of 29th Sep-

(i) See New Trial and Stay of Execution, *ante*, 174.

tember, 1789, except so far as may have been provided for by the act of 24th September, 1789, subject to such alterations and additions as the Circuit or Supreme Court may make.^(k) Provided, that on judgment in any of the cases aforesaid, where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance. The act of September 24th, 1789, sect. 23, provides, that until the expiration of ten days, (Sundays exclusive,) after rendering judgment or passing a decree, executions shall not issue in any case where a writ of error may be a *supersedeas*, in order to give time to take out a writ of error.

By the 8th section of the act of March 2d, 1793, where it was then required by the laws of any State, that goods taken in execution on a writ of *fiery facias*, shall be appraised previous to the sale thereof, it shall be lawful for the appraisers appointed under the authority of the State, to appraise goods taken in execution on a *fiery facias* issued out of any Court of the United States, in the same manner, as if such writ had issued out of a Court held under the authority of the same. And it shall be the duty of the marshal, in whose custody such goods may be, to summon the appraisers, in like manner as the sheriff is by the laws of the State required to summon them, and the appraisers shall be entitled to the like fees as in case of appraisement under the laws of the State. And if the appraisers, being duly summoned under the laws of the State, shall fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisement.

By the 6th section of the act of 3d. March, 1797, all writs of execution, upon any judgment obtained

(k) See ante, beginning of this Chapter.

for the use of the United States, in any of the Courts of the United States, may run, and be executed in any other State, or in any of the Territories of the United States, but shall be issued from, and made returnable to the Court where the judgment was obtained, any law to the contrary notwithstanding.

By the act of May 7th, 1800, sect. 3, whenever a marshal shall sell any lands, tenements, or hereditaments, by virtue of process from a Court of the United States, and shall die, or be removed from office, or the term of his commission expire, before a deed shall be executed for the same by him to the purchaser, in every such case, the purchaser or plaintiff, at whose suit the sale was made, may apply to the Court from which the process issued, and set forth the case, assigning the reason why the title was not perfected by the marshal who sold the same, and, thereupon, the Court may order the marshal for the time being, to perfect the title, and execute a deed to the purchaser, he paying the purchase money and costs remaining unpaid. And when a marshal shall take in execution any lands, tenements, or hereditaments, and shall die, or be removed from office, or the term of his commission expire, before sale or other final disposition made of the same, in every such case, the like process shall issue to the succeeding marshal, and the same proceedings shall be had, as if such former marshal had not died, or been removed, or the term of his commission had not expired. And the provisions in this section contained, shall be extended to all the cases respectively, which may have happened before the passing of this act.

CHAPTER XIX.

CIRCUIT COURT—EQUITY JURISDICTION.^(a)

THE acts of Congress give the Circuit Court jurisdiction in the cases prescribed^(b) in equity suits, as well as in common law suits. The District Court has no equity jurisdiction, except as to injunctions.

By the 16th section of the act of September 24th, 1789, suits in equity shall not be sustained in either of the Courts of the United States, in any case where plain adequate and complete remedy may be had at law. This, it seems, was the rule independently of the act of Congress.^(c)

By the act of March 2d, 1793, writs of *ne exeat* and injunctions may be granted by any Judge of the Supreme Court, in cases where they might be granted by the Supreme or Circuit Court: but no writ of *ne exeat* shall be granted, unless a suit in equity be commenced, and satisfactory proof shall be made to the Court or Judge granting the same, that the defendant designs quickly to depart from the United States. Nor shall a writ of injunction be granted, to stay proceedings in any Court of a State; nor shall such writ be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same.

(a) See *ante*, Circuit Court—Practice, 150, 151. See also *ante*, 19, 20, 21.

(b) See the 11th section of the act of September 24th, 1789, *ante*, 10.

(c) *New York v. Connecticut*. 4 Dall. 5. PATTERSON J. See *Georgia v. Brailsford*. 2 Dall. 406.

A Circuit Court cannot enjoin proceedings in a State Court, though the bill was filed in a State Court of Chancery and removed into the Circuit Court.(d)

A Circuit Court may issue an injunction to stay proceedings on a judgment in the same Court, between the same parties, and if the *subpoena* be served out of the district, and the defendant files an answer to the bill, without objecting to the service of process, the Court has jurisdiction.(e)

The notice required by this act, extends to applications to the Supreme or Circuit Court for injunctions, as well as to those which are made to a single Judge. A shorter notice, however is considered reasonable, in the case of an application to a Court than would generally be required in most cases of application to a single Judge. Where, therefore, a bill was filed in the Supreme Court of the United States, praying an injunction, to restrain the defendants from proceeding in ejectments brought in Connecticut, for lands alleged to lie in the territory of New York, notices that the injunction would be moved for, delivered on the 25th and 26th July, when the term was to commence on the 5th, and did commence on the 6th August ensuing, were held reasonable.(f)

Where a Circuit Court made a decree in an equity case, in the year 1804, and the defendant in the year 1805, filed a bill of review, the Court has not power over its own decree, so as to set the same aside, on motion of one of the defendants, after the expiration of the term in which it was rendered.(g)

If there be several defendants in a suit in equity, in the Circuit Court, some of whom appear by the pleadings to be citizens of a different State from that of the

(d) Diggs v. Wolcott. 4 Cranch, 178.

(e) Logan v. Patrick. 5 Cranch, 288.

(f) New York v. Connecticut *et al.* 4 Dall. :

(g) Cameron v. McRobert. 3 Wheat. 591.

plaintiff, and others are not so stated, if a joint interest vested in all the defendants, the Court has no jurisdiction over the cause. If a distinct interest vested in the one who is named a citizen of a different State, so that substantial justice (so far as he was interested,) could be done, without affecting the other defendants, the jurisdiction of the Court ought be exercised as to him alone. (*h*)

By the act of February 13th, 1807, the Judges of the District Courts of the United States shall have as full power to grant writs of injunction, to operate within their respective districts, as is now exercised by any of the Judges of the Supreme Court of the United States, under the same rules, regulations, and restrictions, as are prescribed by the several acts of Congress establishing the judiciary of the United States, any law to the contrary notwithstanding. *Provided*, that the same shall not unless so ordered by the Circuit Court, continue longer than to the Circuit Court then next ensuing; nor shall an injunction be issued by a district Judge, in any case, where the party has had a reasonable time to apply to the Circuit Court for the writ.

The Circuit Court had always an equitable jurisdiction in suits respecting patent rights, where the character of the parties gave it jurisdiction, but not otherwise. It could not, therefore grant an injunction on behalf of a citizen of the State in which the Court sat, against a citizen of the same State, although it was to protect a patent right granted under the laws of the United States: for the acts of Congress did not allow it, in such case, to take cognisance as a Court of Equity, of suits between citizens of the same State, though they did as a Court of law. If it became necessary, in an action at law regularly before a Court, for either

(*h*) *Cameron v. M'Roberts*, 7 Wheat. 591.

party to resort to the equity side, in aid, or in defence of that action, such application might, perhaps, have been proper.⁽ⁱ⁾

But now, by the act of 15th, February, 1819, its jurisdiction is extended. The 1st section provides, that the Circuit Courts of the United States shall have original cognisance, as well in equity, as at law, if all actions suits, controversies, and cases arising under any law of the United States, granting or confirming to authors or inventors, the exclusive right to their respective writings inventions, and discoveries; and upon any bill in equity filed by any party aggrieved, in any such cases, shall have authority to grant injunctions, according to the course and principles of Courts of equity, to prevent the violation of the rights of any authors or inventors, secured to them by any laws of the United States, on such terms and conditions as the said Courts may deem fit and reasonable: *provided however*, that from all judgments and decrees of any Circuit Courts rendered in the premises, a writ of error or appeal, as the case may require, shall lie to the Supreme Court of the United States, in the same manner and under the same circumstances, as is now provided by law, in other judgments and decrees of such Circuit Court.^(k)

The 30th section of the act of 24th September, 1789, enacts, that the mode of proof by oral testimony and examination of witnesses in open Court, shall be the same in all the Courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law.

By the act of 29th April, 1802, sect. 25, in all suits in equity, it shall be in the discretion of the Court, upon the request of either party, to order the testi-

(i) *Livingston v. Van Ingen*, 4 Hall's Law Journ. 36.

(k) See also Writ of Error, Practice and Appeals.

mony of the witnesses therein to be taken by depositions, which depositions shall be taken in conformity to the regulations prescribed by law, for the Court of the highest original jurisdiction in equity, in cases of a similar nature, in that State in which the Courts of the United States may be holden. *Provided, however,* that nothing herein contained shall extend to the Circuit Courts which may be holden in those States in which testimony in Chancery is not taken by deposition.^(l)

The 30th section of the act of September 24th, 1789, provides, that nothing therein shall be construed to extend to depositions in *perpetuam rei memoriam*, which, if they relate to matters that may be cognisable in any Court of the United States, a Circuit Court, on application thereto made as a Court of Equity, may, according to the usages in Chancery, direct to be taken.^(m)

It has been held, that a Circuit Court of Tennessee could not as a Court of Equity, award a writ of *habere facias possessionem*, to enforce its decree, by which it vested in the complainant lands of which the defendant retained possession.⁽ⁿ⁾

In a Chancery suit, the Circuit Court being always competent to award costs in that Court, may do so after reversal in the Supreme Court and mandate, and may issue execution therefor, where the decree of the Supreme Court directs payment of the money and interest, and such execution and proceedings in the same as, according to equity and justice and the laws of the United States, ought to be had.^(o)

^(l) See *ante*.

^(m) See act of 20th, February, 1812, *ante*,

⁽ⁿ⁾ *Wallen v. Williams*, 8 Cranch, 602.

^(o) *McKnight v. Craig's administrator*, 6 Cranch, 187

tion.) as are allowed in the Supreme or Superior Courts of the respective States.

By the 1st section of the act of 22d July, 1813, whenever there shall be several actions, or processes, against persons who might legally be joined in one action or process, touching any demand, or matter in dispute, before a Court of the United States, or of the Territories thereof, if judgment be given for the party pursuing the same, such party shall not thereon recover the costs of more than one action, or process, unless special cause for several actions or processes shall be satisfactorily shewn on motion in open Court. By sect. 3, whenever causes of like nature, or relative to the same question, shall be pending before a Court of the United States, or of the Territories thereof, it shall be lawful for the Court to make such orders and rules, concerning proceedings therein, as may be conformable to the principles and usages belonging to Courts, for avoiding unnecessary costs or delay in the administration of justice; and accordingly, causes may be consolidated, as to the Court shall appear reasonable.

And, if any attorney, proctor, or other person admitted to manage and conduct causes, in a Court of the United States, or the Territories thereof, shall appear to have multiplied the proceeding in any cause before the Court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of the Court to satisfy any excess of costs so incurred.

Executions.(i)

The act of May 8th, 1792, sect. 2, provides, that the forms of executions and other process in suits at common law, except their style, shall be the same as were then used in pursuance of the act of 29th Sep-

(i) See New Trial and Stay of Execution, *ante*, 174.

in any suit, shall be dead, it shall be lawful for the clerk during the recess of the Court upon application, to issue process to bring into Court the representative of such deceased person.

4. The plaintiff shall file his bill before or at the time of taking out the *subpœna*.

5. The plaintiff may amend his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small matter afterwards, without paying cost; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby.

6. The day of appearance shall be the rule day after the process is returned executed, or after the second return of a copy left, *if the process shall not be executed*, when the process is returnable to the rules, or the rule day next succeeding the term, where the process shall be returnable to a term of the Court; and if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute, unless cause be shown at the term next succeeding that to which the decree shall be returned executed.

7. If the defendant cannot be found, it shall be sufficient service of any decree *nisi*, to leave a copy thereof with his wife, or any free white person who is a member of his or her family; and if no such person be found, then it shall be sufficient service to publish the same in such paper of the district as may be designated by the Court for such time as the Court shall direct.

8. All process shall be executed by a sworn officer, or affidavit must be made of the service thereof, when executed by any other person.

9. Every defendant may swear to his answer before any Justice or Judge of the United States, or a commissioner or master, or other person appointed by the Court, or a Judge of any Court of a State or Territory, or Justice of the peace, or Notary Public of any State or Territory.

10. If the defendant does not file his answer within three months after the *subpœna* be returned executed, or after a second return of a copy left having been made at least three months, plaintiff may either proceed on his bill as confessed, or have a general commission to take depositions; or he may move the Court for an attachment to bring in the defendant to answer interrogatories, at his election, and may proceed to a hearing in the two last cases, as if the answer had been filed, and the cause was at issue. *Provided*, that the Court may, on cause shown, allow the answer to be filed, and grant a further day for hearing. And when a party is in custody on such writ of attachment, he shall be detained in custody until he shall file his answer, or be discharged by order of the Court, or one of the Judges thereof.

11. No special replication to an answer shall be filed but by leave of the Court, or one of the Judges thereof for cause shown; and if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without costs, at the discretion of the Court.

12. When a cross bill shall be exhibited, the defendant or defendants to the first bill shall answer thereto, before the defendant or defendants to the cross bill, shall be compelled to answer such cross bill.

13. The complainant shall put in the general replication, or file exceptions within two calendar months after the answer shall have been put in. If he fails so to do, the defendant may leave a rule to reply with

the clerk of the Court, which being expired, and no replication or exceptions filed, the suit may be dismissed with costs, but the Court may, for cause, order the same to be retained on payment of costs.

14. If the plaintiff's attorney or solicitor shall except against any answer as insufficient, he may file his exceptions, and leave a rule with the clerk to made a better answer within two calendar months; and if within that time the defendant shall put in a sufficient answer, the same shall be received without costs; but if any defendant insists on the sufficiency of his answer, or neglects or refuses to put in a sufficient answer, or shall put in another insufficient answer, the plaintiff may set down his exceptions to be argued at the next term; and after the expiration of that rule, or any second insufficient answer put in, no farther or other answer shall be received but on payment of costs.

15. If, upon argument, the plaintiff's exceptions shall be over-ruled, or the defendant's answer adjudged insufficient, the plaintiff shall pay to the defendant, or the defendant to the plaintiff, such costs as shall be allowed by the Court.

16. Upon a second answer being adjudged insufficient, costs shall be doubled by the Court, and the defendant may be examined upon interrogatories, and committed until he or she shall answer them; or the plaintiff may move the Court to take so much of his bill as is not answered for confessed, and may file his replication, obtain commissions, and proceed to hearing in the usual manner.

17. Rules to plead, answer, reply, rejoin, or other proceedings not before particularly mentioned, when necessary, shall be given from month to month with the clerk in his office, and shall be entered in a rule book for the information of all parties, attornies, or

solicitors concerned therein, and shall be considered as sufficient notice thereof.

18. The defendant may at any time before the bill is taken for confessed, or afterwards with the leave of the Court, demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer as to the residue; but in any case in which the bill charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the fact on which the charge is founded.

19. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

20. If a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly.

21. If the plaintiff shall not reply to, or set for hearing any plea or demurrer, before the second term of the Court after filing the same, the bill may be dismissed with costs.

22. Upon a plea or demurrer being argued and overruled, costs shall be paid as where an answer is adjudged insufficient; but if adjudged good, the defendant shall have his costs.

23. The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer, and have the same benefit thereof as if he had pleaded the same matter, or had demurred to the bill.

24. After any bill filed, and before the defendant hath answered, upon oath made that any of the plaintiff's witnesses are aged, infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk may issue a commission for taking the examination of such witness or witnesses *de bene esse*, the party praying such commission giving reasonable notice to the adverse party of the time and place of taking such deposition.

25. Testimony may be taken according to the acts of Congress, or under a commission. Whenever a general commission shall be issued for taking depositions upon answer and replication, six months from the time of the replication shall be allowed the parties for taking their depositions; and either party at the expiration of the said six months may set the cause for hearing, and no deposition taken after that time shall be read as evidence on the hearing, unless the same was taken by consent of parties, by special order of the Court, or out of the district.

26. Commissions to take depositions may be executed by any person qualified to take testimony according to the laws of the State, or by any person or persons not exceeding three, appointed or named in the commission by order of the Court, or by any Judge thereof in vacation. All testimony taken under a commission shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule day, after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waves his right.

27. Orders for the admission of a guardian *ad litem*, to defend a suit, may be made either by the Court or one of the Judges thereof.

28. Witnesses who live within the district may,

upon due notice to the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause by *subpæna* in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioners, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compenstion as for attendance in Court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the Court, which being certified to the clerk's office by the commissioners, master, or examiner, an attachment may issue thereupon by order of the Court, or of any Judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the Court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open Court.

29. When a matter is referred to a master to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice thereof to the parties, or to the attorney or solicitor of such party as may not reside within the district, and if either party shall fail to attend at the time and place, the master may adjourn the examination of the matter to some future day, and give notice thereof to the parties, in which notice it shall be expressed that if the party fail again to appear, the master will proceed *ex parte*; and if after receiving such notice the party shall again fail to appear, the master may proceed to examine the matter to him referred, and to report the same to the Court, that such proceedings may be had thereon as to the Court shall seem equitable and right.

30. The Courts in their sittings may regulate all proceedings in the office, and may set aside any dis-

missions, and reinstate the suits on such terms as may appear equitable.

31. Every petition for a re-hearing shall contain the special matter or cause on which such re-hearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person. No re-hearing shall be granted after the term at which the final decree of the Court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, it may be admitted at any time before the end of the next term of the Court, in the discretion of the Court.

32. The Circuit Courts may make any further rules and regulations not inconsistent with the rules hereby prescribed, in their discretion.

33. In all cases where the rules prescribed by this Court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England.

CHAPTER XX.

DISTRICT COURT—ORGANIZATION.

THE District Courts compose another class of inferior Courts established by Congress, in conformity to the power given by the Constitution.

For the purpose of their organization, the United States are divided into districts, in each of which is a Court, called a District Court, which, by the 2d, and 3d sections of the act of September 24th, 1789, is to consist of one Judge, who is to reside in the district for which he is appointed, and to hold annually four sessions. By subsequent acts of Congress the number of annual sessions in particular districts, is sometimes more and sometimes less, and they are to be held at various places in the district.

These districts are at present as follows :

- Southern district of New York.**
- Northern district of New York.**
- New Jersey.**
- Connecticut.**
- Eastern district of Pennsylvania.**
- Western district of Pennsylvania.**
- Delaware.**
- Massachusetts.**
- Maine.**
- Maryland.**
- Georgia.**
- New Hampshire.**

DISTRICT COURT

Eastern district of Virginia.
Western district of Virginia.
Kentucky.
South Carolina.
North Carolina.
Rhode Island.
Vermont.
East Tennessee.
West Tennessee.
Ohio.
Louisiana.
Indiana.
Mississippi.
Illinois.
Alabama.
Missouri.

There is also one District Court for the District of Columbia, held by the Chief Justice of the Circuit Court of that district.

A class of these Courts exercises the powers of a Circuit Court, under the same regulations as they were formerly exercised by the District Court of Kentucky, which was the first of the kind. By the act of September 24th, 1789, sect. 10, the District Court in Kentucky district was, besides the usual jurisdiction of a District Court, vested with jurisdiction of all other causes, except of appeals and writs of error, therein after made cognisable in a Circuit Court, and writs of error and appeals were to lie from decisions therein to the Supreme Court, and, under the same regulations ; and by the 12th section, cases might be removed from a State Court to such Court, in the same manner as to a Circuit Court. Of this description at present are the District Courts of,

The Western district of Pennsylvania.
The Western district of Virginia.

Louisiana.
Indiana.
Mississippi.
Illinois.
Alabama.
Missouri.

The same powers of a Circuit were given by the 10th and 21st sections of the act of September 24th, 1789, to the Judge of the District Court of Maine, but writs of error and appeals were to lie from that Court to the Circuit Court of Massachusetts. A Circuit Court having been since established in Maine, the only Court of this description now in existence is the District Court of the Northern district of New York, from which writs of error lie to the Circuit Court in the Southern district of New York.(a)

The 7th section of the act of September 24th, 1789, gives the District Courts power to appoint clerks; and the clerk of the District Court is to be clerk of the Circuit Court. By the 3d section the records are to be kept at the place of holding the Court, where there is only one place : and where there are two, at the place appointed by the district Judge. Subsequent laws designate the place of holding the Court in some districts.

As to the cases in which a writ of error or appeal lies from the District Courts acting as Circuit Courts, to the Supreme Court of the United States.(b)

By the 3d section of the act of September 24th, 1789, the district Judge has power to hold special Courts at his discretion, in the same place as the stated Courts, or in districts that have two, at either of them, at the discretion of the Judge, or at such other

(a) Act of 9th April, 1814.

(b) See *ante*, 28. 41.

place in the district, as the nature of the business and his discretion shall direct.

By the 6th section of the act of September 24th, 1789, a District Court, in case of the inability of the Judge to attend at the commencement of a session, may, by virtue of a written order from the Judge, directed to the marshal of the district, be adjourned, by the said marshal, to such day antecedent to the next stated session of the said Court, as, in the said order shall be appointed; and in case of the death of the said Judge, and his vacancy not being supplied; all process, pleadings, and proceedings, of what nature soever, pending before the said Court, shall be continued of course, until the next stated session after the appointment and acceptance of the office by his successor. The 11th section of the act of May 8th, 1792, provides, that in all suits and actions in any District Court of the United States, in which it shall appear that the Judge of any such Court is any ways concerned in interest, or has been of counsel for either party, it shall be the duty of such Judge, on application of either party, to cause the fact to be entered on the minutes of the Court, and also to order an authenticated copy thereof, with all the proceedings in such suit or action, to be forthwith certified to the next Circuit Court of the district, which Circuit Court shall thereupon take cognisance thereof, in like manner as if it had been originally commenced in that Court, and shall proceed to hear and determine the same accordingly. By the act of March 26th, 1804, sect. 1, in case of the inability of the Judge of any District Court to attend on the day appointed for holding a special or an adjourned District Court, such Court may, by virtue of a written order from the Judge thereof, directed to the marshal of the district, be adjourned by the marshal to the next stated term of said Court, or to such day prior thereto, as in the said order shall be appoint-

ed. By the 1st section of the act of December 18th, 1812, the district and Territorial Judges must reside within the district and Territories for which they are appointed: and it shall not be lawful for any Judge, appointed under the authority of the United States, to exercise the profession or employment of counsel or attorney, or to be engaged in the practice of the law. And any person, offending against the injunction or prohibition of this act, shall be deemed guilty of a high misdemeanor.

For the power of the district Judge to adjourn the session of the District and Circuit Courts to some other place in case of contagious sickness, see the act of February 25th, 1799.(c)

The act of March 2d, 1809, provides for the transfer of causes into the Circuit Court, in case of the disability of the district Judge.(d)

(c) *Ante*, 12.

(d) *Ante*, 97.

CHAPTER XXI.

DISTRICT COURT—JURISDICTION.

The portion of jurisdiction given to the District Courts by the acts of Congress, will be treated of under the following heads.

1. Its admiralty and maritime jurisdiction.

2. Its jurisdiction over seizures on land under the laws of the United States, and in suits for penalties and forfeitures, incurred under the laws of the United States.

3. In causes where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States.

4. In suits by the United States.

5. In suits by and against Consuls.

6. In proceedings to repeal patents.

7. Equity jurisdiction, *habeas corpus*, &c.(a)

(a) There are several acts of Congress vesting a *special* authority in the Judge of the District Court, not embraced within these heads ; such as for instance, that relative to insolvents, (act of January 6th, 1800), the act authorising such Judge to make a deed for lands in certain cases, (May 11th, 1820), the act respecting the election of President and Vice President, (March 1, 1792.)

1. The admiralty and maritime jurisdiction embraces,

1. The ordinary jurisdiction.

2. That expressly vested.

1. The ordinary jurisdiction comprehends,

1. Prize suits.

2. Salvage.

3. Torts and injuries.

4. Contracts, such as seamen's wages, materials, pilotage, bottomry, &c.

2. That expressly vested embraces,

1. Seizures under laws of impost, &c.

2. Captures, within the jurisdictional limits of the United States.

1. Of the ordinary admiralty and maritime jurisdiction of the District Court.

By the act of September 24th, 1789, sect. 9, the District Court shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction.

The District Court has the whole original jurisdiction in admiralty and maritime causes, including prize, as well as other causes of a maritime nature. The words "all causes of admiralty and maritime jurisdiction," include all maritime causes, whether peculiarly of admiralty jurisdiction or not.^(b) The English distinction between an instance, (which is, strictly, an *admiralty* Court), and a prize Court, does not apply, because a question of prize is clearly of a "maritime" nature. If the District Court do not pos-

^(b) *Penhallow v. Doane*. 3 Dall. 54. *Glass v. Schooner Betsy*. 3 Dall. 6. *Brown v. The United States*. 8 Cranch, 137.

sess this authority, the Constitution and laws do not vest it.(c) The word "maritime," it would seem, was inserted for the purpose of vesting a jurisdiction larger than that which under the statutes of 13th. and 15th Richard II, was alleged to belong to the admiralty of England, and of making that jurisdiction dependent, not on the limits of place, but on the nature of the cause.(d)

The admiralty and maritime jurisdiction, vested by the Constitution, is necessarily exclusive of all State authority. It is only in those cases where, previous to the formation of the Constitution, State tribunals possessed jurisdiction independent of national authority that they can now constitutionally exercise a concurrent jurisdiction. Admiralty and maritime causes enter into the national policy, affect the national rights, and may compromit the national sovereignty.(e)

This jurisdiction being exclusively vested in the United States Courts by the Constitution and laws, and as no foreign power can of right institute or erect any Court of judicature of any kind within the United States, but such only as may be warranted by, and be in pursuance of treaties, the admiralty jurisdiction that had been exercised in the United States by the Consuls of France, not being so warranted, was declared by the Supreme Court of the United States, not to be of right.(f)

As the jurisdiction is dependent on the subject matter, the District Court has jurisdiction to carry into

(c) *Penhallow v. Doane*. 3 Dall. 54. 97.

(d) *De Lovio v. Boit*. 2 Gall. 398. *The Sandwich*. *Peter's Rep.* 233, *note*. See 6 *Hall's Law Journ.* 557. 1 *Hall's Law Journ.* 419.

(e) *Martin v. Hunter's lessee*. 1 Wheat. 337.

(f) *Glass v. Schooner Betsy* 3 Dall. 6. See Letter of Mr. Jefferson to Mr. Morris, 16th August, 1793. 1 *Waits State Papers*, 144. 167.

effect the decree in a prize cause of the Court of Appeals, instituted under the old confederation : and that, though the appeal was from a Court of admiralty of a different State from that in which the District Court is.(g) And such decree is conclusive, and its merits cannot be enquired into in a proceeding on it in the District Court.(h) So it seems, its jurisdiction exists in admiralty or maritime causes, although an Ambassador or Consul be a party.(i)

The cession of cases of admiralty and maritime jurisdiction by the Constitution is no cession of the waters on which these cases may arise. The waters themselves remain the territory of the State in which they lie : and its general jurisdiction remains as a portion of sovereignty not given away, subject to the grant of power in Congress, to pass all laws for the full and unlimited exercise of admiralty and maritime jurisdiction. Cessions of territory and exclusive jurisdiction are regulated by the 8th section of the 3d article of the Constitution, and not by the article describing the judicial power.(k)

The United States Courts have cognisance of all cases of admiralty and maritime jurisdiction on all the rivers of the United States, which are navigable to the sea for boats of ten tons burthen and upwards. It was, therefore, held, that where the supercargo or agent for the owners of a steam boat, bound from New Orleans to Louisville in Kentucky, on the death of the Captain during the voyage, by consent of the captain and crew, took charge as captain, paid the hands, hired a new crew in the place of those that

(g) *Penhallow v. Doane*. 3 Dall. 54. *Jennings v. Carson*. 4 Cranch, 2. *United States v. Peters*. 5 Cranch, 145.

(h) *Ib.*

(i) *Cohens v. Virginia*. 6 Wheat. 397. See *United States v. Bright*, opinion of WASHINGTON J. 3 Hall's Law Journ. 225.

(k) *United States v. Bevans*. 3 Wheat. 388, 389.

died, and made repairs, before reaching the limits of Kentucky, he had a remedy in the District Court of the United States of Kentucky, for these expenses; that they were a lien on the boat, which might be enforced by libel *in rem*; and a decree was made for the sale thereof.^(l)

1. Of Prize suits.

Under the act of September 24th, 1789, the District Court has as full jurisdiction of all prize causes as the admiralty of England. This jurisdiction is an ordinary inherent branch of the powers of the Court of admiralty, and not an extraordinary power delegated or called into action at the breaking out of a war. And though this jurisdiction, in all cases of capture of goods and vessels brought within the United States, and of damages for unreasonable captures, was, by the prize act of June 26th, 1812, expressly vested in the District Courts, yet, it seems, it exists in full force in such Court, without the special provision of an act of Congress.^(m) Such jurisdiction does not depend on locality, but on the subject matter. The admiralty takes cognisance, not only of all captures made at sea, and in creeks, havens, and rivers but also of all captures made on land by a naval force, or by a co-operation of a naval force.⁽ⁿ⁾ Whether the admiralty has jurisdiction to take cognisance of captures made on land by land forces only, and whether a seizure by a non-commissioned captor on land of property liable to seizure and condemnation in war, ought to be pro-

(l) *Savage v. The Steam Boat Buffalo*, District Court of Kentucky, 1819, before TRIMBLE, District Judge. It is understood a similar principle has been decided in Pennsylvania and Virginia.

(m) *Brown v. United States*. 8 Cranch, 137. *The Amiable Nancy*. 3 Wheat. 546.

(n) *Brown v. United States*. 8 Cranch, 137.

ceeded against as prize, or by a process applicable to municipal forfeitures, *query*.(o)

A public vessel of war belonging to a foreign nation at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the District or other Courts of the United States, under the existing authority vested in them. A libel, therefore, cannot be sustained in the District Court against a national armed vessel belonging to such foreign nation found in our waters, and proceeded against by an individual claiming title to such vessel.(p) Nor has the District Court jurisdiction on a libel for damages, for the capture of a vessel as prize by the commissioned cruiser of a belligerent power, although the captured vessel is alleged to belong to citizens of the United States, and the capturing vessel and her commander be found and proceeded against within the jurisdiction of the Court, the captured vessel having been carried *infra præsidia* of the captors.(q) Nor is other property of the captor, such as the captured vessel, which is in the power of the Court, liable to be applied by the District Court to the redress of alleged torts committed on the high seas, on the property of our citizens.(r)

But the District Courts have jurisdiction over captures made by foreign vessels of war of the property of our citizens, or of other nations, with whom the United States are at peace, where such vessels are equipped, or their force augmented in this country in violation of the laws of the United States, and of our neutrality.(s) Therefore, on a libel by a neutral

(o) 8 Cranch, 137.

(p) *The Exchange v. M'Faddon*. 7 Cranch, 116.

(q) *United States v. Peters*. 3 Dall. 121. *Case of the Cassius*.

(r) *The Invincible*. 1 Wheat. 238.

(s) *Ib.* *Talbot v. Jansen*. 3 Dall. 133. *Moodie v. The Betsey*. 3 Dall. 288, *note*. *Brig Alerta*. 9 Cranch, 359.

against a belligerent cruiser for restitution of a vessel captured by the latter on the high seas as prize, and brought into the United States, the District Court is competent to inquire and decide, whether restitution ought to be made in whole or in part: that is, whether it can be made consistently with the laws of nations, and the treaties and laws of the United States,^(t) and in the absence of any act of Congress on the subject, the Courts of the United States would have authority to decree restitution of property captured in violation of their neutrality, under a commission issued within the United States, or under an armament, or any augmentation of an armament or crew of the capturing vessel within the same.^(u) And it makes no difference, whether the capturing vessel, which thus violates our neutrality, be a public ship of war or a privateer, for in either case the District Court may decree restitution of the property if brought within its jurisdiction.^(x) But their jurisdiction for this purpose extends only to restitution of the specific property, when voluntarily brought within their jurisdiction, with costs and expenses during the pendency of the suit, and not to the infliction of vindictive damages, as in ordinary cases of marine torts. But whether, when a prize has been taken by a vessel fitted out in violation of our neutrality, the vessels of the United States have power to re-capture the prize on the high seas, and bring it into our ports for adjudication, *query*.^(y) To justify restitution in any case, however, the fact of a violation of our neutrality must be clearly made out:

(t) *Glass v. Schooner Betsy*. 3 Dall. 6. *United States v. Peters*. 3 Dall. 121. *Falbot v. Jansen*. 3 Dall. 133.

(u) *The Estrella*. 4 Wheat. 298.

(x) *The Santissima Trinidad*. 7 Wheat. 285.

(y) *L'Amistad de Rués*. 5 Wheat. 385. *Stoughton v. Taylor*. District Court of New York. Nat. Intell. Dec. 3 and 5, 1818.

if it be doubtful, the Court ought not to exercise its jurisdiction.(z)

Query, Whether the Court has power to inquire into the regularity of the commission of the capturing cruizer, or of the expiration of its term, when the captured property is brought within the jurisdiction of the Court, so as to adjudge the capture piratical?(a)

In the case of a capture made by a cruizer illegally fitted out or whose force is augmented in the United States, the national character of the captor is immaterial. But in regard to citizens of the United States, there is a further restriction : for if a citizen, the owner and commander of an armed vessel cruize under a commission from one foreign belligerent against another when we are at peace with both, contrary to treaty and to the neutrality act, and the captured property be brought into the United States, such captor is not entitled to the property, but it will be restored to the owners. Such citizens of the United States may not be liable as pirates, but their acts are unlawful, and no title is derived under them to the property captured.(b)

Whether the jurisdiction of the District Court, as a Court of admiralty and maritime jurisdiction, is exclusive of the Courts of common law in marine trespasses, depends not on the place, but on the nature of the case. It has exclusive jurisdiction where the question is prize or no prize ; because such question is to be decided by the laws of nations. But where it is not a question of prize, where the rights of the parties are to be determined by the municipal law, and not by the law of nations, it seems, the Courts of common law have a concurrent jurisdiction. Thus where a vessel was fitted out, and a commission put on board of her in the United States, for the purpose of cruising against

(z) *L'Amistad de Rues.* 5 Wheat. 885.

(a) *The Alerta.* 9 Cranch, 359.

(b) *The Bello Corunnes.* 6 Wheat. 152. See *post.* Piracy.

Spain, with which the United States were then at peace, and such vessel during her cruize, captured an American vessel, sailing under Spanish colours to avoid capture by the British, (the United States being then at war with Great Britain), and took possession of and detained her, it was held, by the Supreme Court of New York, in an action of trover brought by the owners of the American vessel against the owners of the cruiser, that this was not a case of prize or no prize, and therefore exclusively of admiralty jurisdiction, but that trover would lie at common law, as the capture was illegal by the municipal law, the capturing vessel having violated the act of Congress, and her commission being void.(c)

2. Salvage.

As a Court of admiralty the District Court has, under the Constitution and laws, exclusive original cognisance in cases of salvage ;(d) and, as a consequence, it has power to determine, to whom the residue of the property, after deducting the salvage, belongs. Therefore, after decreeing salvage to neutrals, who bring in a deserted vessel found at sea, which had been captured by one belligerent from another, it may decide, to which of them the residue shall go.(e)

It is doubted whether an admiralty Court has jurisdiction as to salvage where the parties are aliens ; but, it seems, consent may, in such case, give jurisdiction.(f)

The act of March 3d, 1800, provides for salvage in the cases of vessels or goods belonging to persons resident in, or under the protection of the United

(c) *Hallet v. Novion*. 14 Johns. 273. SPENCER and YATES J. diss.

(d) *Martin v. Hunter's lessee*. 1 Wheat. 335.

(e) *McDonough v. Dannery*, 3 Dall. 183.

(f) *Mason v. Ship Blaireau*. 2 Cranch, 249.

States, or to the United States, or to persons in amity with the United States, taken by enemies and retaken, before condemnation, by the public or private vessels of the United States. In some of these cases, it is fixed by treaties. In other cases, the proportion allowed for salvage is settled by the Court, according to the general principles of maritime law.

3. Torts and Injuries.

The District Court has jurisdiction over all torts and injuries committed upon the high seas, and in ports or harbours within the ebb and flow of tide. Such causes are within the jurisdiction of the District Court, by virtue of the delegation of jurisdiction in all civil causes of admiralty and maritime jurisdiction: and are independent of the prize act.(g)

But it seems that for certain marine torts, as for example negligently running down a vessel at sea, a Court of common law has concurrent jurisdiction with a Court of admiralty.(h)

4. Contracts.

The District Court as a Court of admiralty has jurisdiction, concurrent with the common law, over all maritime contracts wheresoever the same may be made or executed, or whatever the form of the contract. And such cases are within the jurisdiction of this Court by the grant of jurisdiction "in all civil cases of admiralty and maritime jurisdiction."(i) Maritime contracts are such as relate to the business commerce or navigation of the sea: such as charter parties, affreightments, marine hypothecations, contracts

(g) *Martin v. Hunter's lessee*. 1 Wheat. 304. *The Amiable Nancy*. 3 Wheat. 546. *De Lovio v. Boit*. 1 Gall. 398. *Burke v. Trevitt*. Mason, 96.

(h) *Percival v. Hickey*. 18 Johns. 257.

(i) *De Lovio v. Boit*. 2 Gall. 398. *The Jerusalem*. 2 Gall. 345.

for maritime service in the building repairing, supplying, and navigating ships: contracts between part owners of ships; contracts and *quasi* contracts respecting averages, contributions, and jettisons. A policy of insurance is also a maritime contract, and therefore the District Court has cognisance of a suit upon it concurrent with the Courts of common law.

The District Court, as a Court of admiralty, possesses a general jurisdiction in suits by material men *in rem* and *in personam*.^(k) A suit *in personam* is always maintainable. But where the proceeding is *in rem*, to enforce a specific lien for material men, it is incumbent on the plaintiff, to establish the existence of such lien in the particular case. Where repairs have been made or necessities furnished to a foreign ship, or to a ship in the ports of a State to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in the District Court to enforce that right. But as to repairs or necessities furnished in the port or place to which the ship belongs, the case is governed by the local law of the State, and no lien is implied unless by that law. If the local law gives a lien it may be enforced in the admiralty.^(l) As, therefore, the common law, which was the law of Maryland, gave material men and mechanics furnishing repairs to a domestic ship, no particular lien for recovery of their demands, the District Court could allow none.^(m) A shipwright, indeed, who has possession may, like any other artist, retain it till paid: but if he once parts with the possession, or has worked upon it without

(k) *The General Smith*. 4 Wheat. 438. *The Jerusalem*. 2 Gall. 345.

(l) *Ib*.

(m) *The General Smith*. 4 Wheat. 438. See *Woodruff v. The Levi Dearborne*. 4 Hall's Law Journ. 97.

taking possession, he has no claim on the ship. But still he may sue there *in personam*.^(o)

So the District Court, as a Court of admiralty, has jurisdiction of a suit against the ship to recover pilotage, earned in piloting the vessel from the high seas into a port of the United State, where the contract was made on the high seas. And, it seems, it has jurisdiction as well by petition *in personam*, as by libel or information *in rem* for pilotage due for services performed on, from, or to the sea.^(p) It has also jurisdiction, on the application of some of the part owners of a vessel, to compel the others, who are about sending her to sea, to give security, &c.

2. The admiralty jurisdiction expressly vested in the District Court embraces,

1. Seizures under laws of impost, &c.

1. The 9th section of the act of September 24th, 1789, enacts, that the District Court shall have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas, saving to suitors, in all cases, the right of a common law remedy, when the common law is competent to give it.

Seizures of the description here mentioned are properly civil causes of admiralty and maritime jurisdiction, and are to be tried by the District Court, and not by a jury.^(q) Congress meant to discriminate be-

^(o) The General Smith. 4 Wheat. 438. See Woodruff v. The Levi Dearborne. 4 Hall's Law Journ. 97.

^(p) The Anne. Mason, 508.

^(q) United States v. Betsy and Charlotte. 4 Cranch, 438. Whelan v. United States. 7 Cranch, 112. United States v. La Ven-

tween seizures on waters navigable from the sea, and seizures on land or waters not navigable, and to class the former among, civil causes of admiralty and maritime jurisdiction.^(r) The reason of the legislature for putting causes of this kind on the admiralty side of the Court is said to have been, the great danger to the revenue, if such cases should be left to juries.^(s)

The process under this act does not in any degree touch the person of the offender, but is in nature of a libel *in rem*,^(t) which in its terms and essence is an information *in rem*, and comes within the words of an act authorising proceedings by information on a seizure under a law of impost, navigation, or trade.^(u) And such information is not to be construed according to the technical niceties of a common law information, but is construed liberally and is sufficiently precise, if the offence be described in the words of the law, and so set forth, that if the allegation be true, the offence must be within the statute.^(x) The technical niceties introduced into criminal law do not belong to proceedings in the admiralty.^(y)

— The jurisdiction by proceeding *in rem* is exclusively vested in the District Court by the act of September 24th, 1789 : and the Circuit Court cannot entertain it.^(z) If, therefore, general words are used in the law, the proceeding must be in the District Court. Thus proceedings by information against a vessel for a forfeiture under the non-importation act of March 1st, 1809, which provides for a recovery of the penal-

geance. 3 Dall. 297. *Yeaton v. United States*. 5 Cranch, 281. *The Samuel*. 1 Wheat. 9. *The Octavio*. 1 Wheat. 20.

(r) *United States v. Betsy and Charlotte*. 4 Cranch, 443.

(s) Per CHASE J. *Ib.* 446, *note*,

(t) *United States v. La Vengeance*. 3 Dall. 297.

(u) *The Samuel*. 1 Wheat. 9.

(x) *Ib.*

(y) *Ib.*

(z) *Ketland v. The Cassius*. 2 Dall. 365.

ties and forfeitures by action of debt in the name of the United States of America, or by indictment, or information in any Court having competent jurisdiction to try the same, the vessel being seized at Newport, were regularly to be had in this Court. *(a)* So also on a libel for a forfeiture for an exportation of arms to St. Domingo, (commencing at Sandy Hook,) contrary to the act of 22d May, 1794; *(b)* of a vessel seized by the collector of Norfolk under the slave trade act of March, 1794; *(c)* of a vessel seized in the port of Alexandria for violation of the act to suspend commercial intercourse with St. Domingo, *(d)* wherein no method of recovery is specified; *(e)* or of a vessel seized in the port of Philadelphia under the neutrality act of 5th June 1794, against fitting out a ship for the service of a foreign state against another foreign state at peace with the United States, *(f)* with various others.

But where the act of Congress imposes fine and imprisonment, the prosecution must take place in the Circuit Court, if it exceed the grade of punishment beyond the jurisdiction of the District Court. *(g)*

So, where an act of Congress, (9th January 1809,) prohibited the attempt to export merchandise, and declared that the offenders, their aiders, and abettors should, upon conviction, be adjudged guilty of a high misdemeanor, and fined a sum by the Court before which the conviction was had equal to four times the value, and by a subsequent section declared, that all penalties and forfeitures incurred by force of the act, unless therein before provided for, might be prose-

(a) The Samuel. 1 Wheat. 9.

(b) United States v. La Vengeance. 3 Dall. 297.

(c) United States v. The Sally of Norfolk. 2 Cranch, 106.

(d) United States v. Betsy and Charlotte. 4 Cranch, 443.

(e) 1 Wheat. 11. arg.

(f) Ketland v. The Cassius. 2 Dall. 365.

(g) Ib. United States v. Guinet. 2 Dall. 321, *ante*, 130.

cuted sued for, and recovered by action of debt or by indictment, information, &c. it was held an offence against the United States, and not merely an act liable to a penalty : and that therefore it was within the original jurisdiction of the Circuit Court by information *in personam*.(h)

Before judicial cognisance can attach upon a forfeiture *in rem*, under the act of Congress of September 24th, 1789, there must be a seizure : for until seizure, the *forum* cannot be ascertained.(i) It is the place of seizure, and not of committing the offence, that decides the jurisdiction, under this act.(k) Where the seizure is within the limits of a judicial district, the District Court of that district has exclusive cognisance, and if brought into any other district the Court will remit the property to the proper district. But the cognisance of seizures on the high seas belongs to any District Court, into which the property is brought.(l)

If a seizure of a vessel for breach of an act of Congress be made within the territory of a foreign state, and she is brought in seized and proceeded against by the civil officers of the United States, the proceedings under the latter seizure are valid, even if the former seizure were a trespass. The former seizure is an offence against the foreign power, and must be adjusted between their government and ours : the Court cannot take cognisance of it.(m)

Though a seizure has been made, yet if it be completely and explicitly abandoned and the property restored by the voluntary act of the seizing party, all rights under it are gone : and though judicial jurisdic-

(h) *United States v. Mann.* 1 Gall. 3. 177.

(i) *United States v. Brig Ann.* 9 Cranch, 289.

(k) *Ib.* *United States v. Betsy and Charlotte.* 4 Cranch, 443
Keene v. The United States. 5 Cranch, 304.

(l) *The Abby.* Mason, 360.

(m) *Ship Richard v. United States.* 9 Cranch, 102.

tion once vested, it is divested by the subsequent proceedings, and can be revested only by a new seizure.⁽ⁿ⁾ Where, therefore, a revenue cutter seized a vessel bound to New York, and the collector of New Haven took possession as forfeited to the United States, but in a few days gave written orders for her release, in pursuance of directions from the Secretary of the Treasury of the United States, and returned the ships papers to the master, and gave permission to proceed to New York. Afterwards, on the same day, the District Judge of the district of Connecticut allowed an information against her, and on the ensuing day, the brig and cargo were taken possession of by the marshal, it was held, that the District Court had no jurisdiction.^(o) But, to constitute such abandonment, there must be an intention coupled with an unequivocal act of dereliction. The evidence of it ought to be extremely strong.^(p)

If the seizing officer refuse to institute proceedings *in rem*, the District Court may, on application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure.^(q) It may compel a re-delivery of the property, or its value, into the possession of those who may be ultimately entitled to it, by way of original suit, or by a summary decretal order in a cause already before the Court.^(r)

Where there is a seizure for a forfeiture under the laws of the United States, the right to decide the same belongs exclusively to the District Court, subject to appeal. If a sentence of condemnation be there pronounced, it is conclusive that a forfeiture has been incurred: if a sentence of acquittal, it is equally conclu-

(n) *The Brig Ann.* 9 Cranch, 289. *The Abby.* Mason, 363.

(o) *The Brig Ann.* 9 Cranch, 289.

(p) *The Abby.* Mason, 363.

(q) *Slocum v. Mayberry.* 2 Wheat. 1.

(r) *Ib. Burke v. Trevitt.* Mason, 29.

sive against the forfeiture.(s) Any intervention of State authority, before the suit *in rem* is decided, which, by taking the thing seized out of the possession of the officer of the United States, might obstruct the exercise of the jurisdiction of the United States Court, as, for instance, replevin, would be a violation of the act of Congress: and such Court might enforce a redelivery by an attachment, or other summary process, against the parties divesting the possession.(t)

If an action be commenced in a State Court, while the proceedings *in rem*, for the supposed forfeiture, are pending in the District Court of the United States, the pendency of the suit *in rem* may be pleaded in abatement, in the nature of a plea to the jurisdiction, with an allegation, that the jurisdiction of the question of forfeiture exclusively belongs to the District Court of the district where the seizure had been made. If the action be commenced after a decree of condemnation, or after an acquittal and a certificate given of reasonable cause of seizure, then, in the former case, by the general law, and, in the latter case, by the special enactment of the act of Congress of the 25th April, 1840, sect. 1, the decree or certificate is a good bar to the action.(u)

If there be a decree of acquittal, and denial of such certificate, then the seizure is established conclusively to be tortious: suit lies in the State Court, and the party is entitled to full damages for the injury. A plea, in such case, that a forfeiture was incurred, is not good: nor is evidence admissible to prove it, by way of defence; nor in mitigation of damages, if the plaintiff claims only the actual damages sustained, and not vindictive damages.(x) But such suit will lie only

(s) *Gelston v. Hoyt*. 3 Wheat. 312. *Slocum v. Mayberry*. 2 Wheat. 1.

(t) *Slocum v. Mayberry*. 2 Wheat. 1.

(u) *Ib.* *Gelston v. Hoyt*. 3 Wheat. 312.

(x) *Ib.*

in the State Court, or District Court. Congress have not vested in the common law tribunals of the United States, the power to decide on the conduct of their officers in the execution of their laws, unless in the Supreme Court on appeal by way of writ of error from the State Court.^(y)

In *Slocum v. Mayberry*,^(z) a distinction seems to have been sustained, between the case of the officers seizing or detaining a *thing* not authorised by act of Congress, and his seizing or detaining a thing authorised, but on insufficient grounds: and, that in the former case, the State Court has jurisdiction before final decree, but not in the latter. Where, therefore, an act of Congress directed a seizure of a *vessel* by the collector, but the collector seized and detained also the *cargo*, and the owner issued a replevin for the cargo in a State Court, it was held, that it lay, because the law gave no authority to detain the cargo. But *Query*.^(a)

All persons having an interest or title in the subject matter are in law deemed parties to a proceeding in the District Court *in rem*, for a forfeiture on a seizure under the laws of the United States. The seizing officer having an interest in establishing the title of forfeiture in such party, is bound by the decree. For some purposes, as to procure a decree of distribution after condemnation, where he is entitled to a share in the forfeiture, or to obtain a certificate of reasonable cause of seizure after acquittal, he may make himself a direct party: in all other cases, he is deemed to be present, and represented by the govern-

^(y) *Gelston v. Hoyt*. 3 Wheat. 312. *Slocum v. Mayberry*. 2 Wheat. 1. But it would seem the Circuit Court may have jurisdiction, if entitled by the character of the parties as citizens of different States, &c.

^(z) 2 Wheat. 1.

^(a) See *Gelston v. Hoyt*. 3 Wheat. 312.

ment. Even strangers are bound, because the decree of a Court of competent jurisdiction *in rem* is, as to the points directly in judgment, conclusive upon the whole world, whether it be a sentence of acquittal or condemnation.(b)

By the act of June 9th, 1794, the district Judges of the United States shall be authorised to appoint a commissioner or commissioners, before whom appraisers of ships or vessels, or goods, wares, and merchandises, seized for breaches of any law of the United States, may be sworn or affirmed, and such qualifications made before such commissioner or commissioners shall be, to all intents and purposes, as effectual, as if the same were taken before the said Judges in open Court.

2. The admiralty jurisdiction expressly vested in the District Court embraces also captures within the jurisdictional limits of the United States.

By the act of the 20th April, 1818, sect. 7, the District Court shall take cognisance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts and shores thereof.

This section formed a part of the first neutrality act, passed the 5th June, 1794, which was repealed and supplied by the above mentioned act, and is intended to provide a tribunal for the redress of violations of the sovereignty of the United States, by captures made within the jurisdictional limits of the United States, by foreign cruizers, of vessels belonging to nations with whom they are at war, but the United States are at peace. In the year 1793, when no act of Congress existed on the subject, it appears that a doubt existed, whether the redress of such violations belonged to the

(b) *Gelston v. Hoyt.* 3 Wheat. 320.

judicial or the executive department of the government. In the case of the British ship *Grange*, captured in that year by the French Frigate *L'Ambuscade*, within the waters of the river Delaware, President WASHINGTON interfered, and applied to the French Ambassador, and procured her restoration. (c) Afterwards, in the same year the British ship *William*, being captured by the French schooner *Citizen Genet*, within, as was alleged, two miles of Cape Henry, and sent into the port of Philadelphia, was libelled in the District Court of the United States for the district of Pennsylvania, and restoration of ship and cargo, and damages were prayed for, but the Court decided that it had not jurisdiction of the case. (d) It appears to have been thought by the President, that it then resulted to the executive to interfere. The *William* was, by his arrangement, placed in the hands of the consuls of France, in lieu of a military guard, till the question of the place of capture should be decided, and, eventually, it was determined that she was captured beyond the jurisdictional limits of the United States. She was, therefore, returned to the captors, and damages awarded in their favour. (e)

It was, also, a question in the case of the *William*, what was the distance from the coast or shore, to which the sovereignty of the United States extended, by the laws of nations. President WASHINGTON fixed it at one sea league, or three geographical miles. (f)

(c) 1 Wait's State Papers, 71. 80. 145.

(d) Findlay et al. v. Ship *William*. 1 Peter's Adm. Decisions, 12. See also Moxon et al. v. Brigantine *Fanny*. 2 Pet. Adm. Dec. 309. S. P.

(e) 1 Wait's State Papers, 145, 146. 168. 2 Wait's State Papers, 314, 315. 347. See *post*. Constitution. Art. vi. sect. 2.

(f) 1 Wait's State Papers, 195. The treaty of 1794, with Great Britain, fixed it within cannon shot of the coast, or in any of the bays, ports, or rivers of their Territories. Art. xxv.

and Congress by the above mentioned acts of 5th June, 1794, and 20th April, 1818, adopted this limit.

By the 8th section of the act of 20th April, 1818, in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, the President is authorised to employ force, for the purpose of taking possession of, and detaining any such ship or vessel, with her prize or prizes, in order to the execution of the prohibitions and penalties of that act, and to the restoring the prize or prizes, in the cases in which restoration shall have been adjudged, &c.

2. The District Court also possesses jurisdiction in certain seizures on land, and in suits for penalties &c.

By the 9th section of the act of September 24th, 1789, the District Court has also exclusive original cognisance of all seizures on land, and other waters than as aforesaid, made, (viz : other than those which are navigable by vessels of ten or more tons burthen within their respective districts, or the high seas), and of all suits for penalties and forfeitures incurred, under the laws of the United States.

It seems, seizures of the above description are triable by jury ; they are not cases of admiralty and maritime jurisdiction.(g)

Query, whether a seizure by a non commissioned captor on land, of property liable to seizure and condemnation in war, ought to be proceeded against as prize, or by a process applicable to municipal seizures.(h)

The words, "penalties and forfeitures," must be restrained to such penalties and forfeitures as may be sued for in a civil action, as for instance, by an action,

(g) *United States v. The Betsy and Charlotte.* 4 Cranch, 443.

(h) *Brown v. The United States.* 8 Cranch, 137.

of debt, or an information of debt.(i) For where an act of Congress, (9th January, 1809,) prohibited the attempt to export merchandises, and declared, that "the offenders their aiders and abettors should, upon conviction, be adjudged guilty of a high misdemeanor, and be find a sum by the Court before which the conviction was had, equal to four times the value," and, by a subsequent section, declared, that all penalties and forfeitures incurred by force of the act, unless therein otherwise provided for might be prosecuted, sued for, and recovered by action of debt, or by indictment, or information &c." it was held, that loading goods in a sleigh, with intent to export to Canada, was an *offence* against the United States, and not merely an act liable to a penalty, and was, therefore, within the original jurisdiction of the Circuit Court, by information *in personam*.(k) And such fine is to be assessed by the Court, and not found by the jury as a penalty.(l)

A bond, conditioned to be void on relanding goods within the United States, is not within the provision as to forfeitures: but the Circuit Court it seems, has jurisdiction of a suit upon such bond.(m)

By the 5th section of the act of 8th May, 1792, in every prosecution for any fine or forfeiture incurred under any statutes of the United States, if judgment is rendered against the defendant, he shall be subject to the payment of costs. And on every conviction for any other offence not capital, the Court may in their discretion award, that the defendant shall pay the costs of prosecution. And if any informer or plaintiff on a penal statute, to whose benefit the penalty or any part thereof if recovered, is directed by law to accrue, shall

(i) United States v. Mann. 1 Gall. 137.

(k) United States v. Mann. 1 Gall. 3. 177.

(l) Ib. United States v. Tyler. Ib. 181. 7 Cranch, 285.

(m) Durousseau v. The United States. 6 Cranch, 35.

discontinue his suit or prosecution, or shall be nonsuit in the same, or if, upon trial, a verdict shall pass for the defendant, the Court shall award to the defendant his costs, unless such informer or plaintiff be an officer of the United States specially authorised to commence such prosecution, and the Court before whom the action or information shall be tried, shall, at the trial, in open Court, certify upon record, that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant. By the act of 28th February, 1799, if any informer on a penal statute, and to whom the penalty or any part thereof if recovered is directed to accrue, shall discontinue his suit or prosecution, or shall be nonsuited in the same, or if, upon trial judgment shall be rendered in favour of the defendant, unless the informer be an officer of the United States, he shall alone be liable to the clerks, marshals, and attornies, for the fees of such prosecution; but, if such informer be an officer whose duty it is to commence such prosecution, and the Court shall certify there was reasonable ground for the same, then the United States shall be responsible for such fees.

By the 6th section of the act of May 8th, 1792, the fees and compensations to the several officers and persons therein before mentioned, other than those which are above directed to be paid out of the Treasury of the United States, shall be recovered in like manner as the fees of the officers of the States respectively for like services are recovered.

By the 2d section of the act July 22d. 1813, whenever proceedings shall be had on several libels against any vessel and cargo which might legally be joined in one libel, before a Court of the United States, or of the Territories thereof, there shall not be allowed thereon more costs than on one libel, unless special cause for libelling the vessel and cargo severally shall be satis-

factorily shewn as aforesaid.(n) And in proceedings on several libels or informations against any cargo, or parts of cargo or merchandize, seized as forfeited for the same cause, there shall not be allowed by the Court more costs than would be lawful on one libel or information, whatever may be the number of owners or consignees therein concerned, but allowance may be made, on one libel or information, for the costs incidental to several claims: *provided*, that in case of a claim of any vessel or other property seized on behalf of the United States, and libelled or informed against as forfeited under any of the laws thereof, if judgment shall pass in favour of the claimant, he shall be entitled to the same upon paying only his own costs.

3. Jurisdiction of the District Court in certain suits by aliens.

The act of September 24th, 1789, sect. 9, provides, that the District Court shall also have cognisance, concurrent with the Courts of the several States or the Circuit Courts, as the case may be, of all causes where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States.

But, it would seem, such suit (if not in the admiralty) must be against a citizen of a State: for, by the Constitution, the right of an alien to sue is restricted to that case; the 11th article of the amendments having taken away the right to sue a State.(o)

4. Jurisdiction of the District Court in suits by the United States.

By the 9th section of the act of September 24th, 1789, the District Court shall also have cognisance, concurrent as last mentioned, of all suits at common

(n) See this Act, *ante*, 156. 177.

(o) See *ante*, in a question of salvage, 206.

law, where the United States sue, and the matter in dispute amounts, exclusive of costs to the sum or value of one hundred dollars. And by the act of March 3d, 1815, sect. 4, it has cognisance, concurrent with the Courts and magistrates of the several States, and the Circuit Courts of the United States, of all suits at common law where the United States, or any officer thereof, under the authority of any act of Congress sue, although the debt, claim, or other matter in dispute, shall not amount to one hundred dollars.(p)

5. Jurisdiction of the District Court in suits by and against consuls.

By the 9th section of the act of September 24th, 1789, the District Court also has jurisdiction, exclusively of the Courts of the several States, of all suits against consuls or vice consuls, except for offences where other punishment than whipping not exceeding thirty stripes, a fine exceeding one hundred dollars, or a term of imprisonment exceeding six months, is inflicted.

For offences above this description, the Circuit Court has jurisdiction in the case of consuls.(q)

It has been determined by the Supreme Court of Pennsylvania, that a State Court has not jurisdiction in an action brought against a consul, the act of September 24th, 1789, having vested such jurisdiction exclusively in the Supreme and District Courts of the United States.(r) And also that a consul is not liable to indictment in a State Court, for a crime committed within the limits of such State, the Constitution having vested in the Supreme Court of the United States,

(p) See *ante*, 37. 107, and, *query*, whether by virtue of this section, the Circuit Court has jurisdiction of common law suits by the United States, or its officers, for claims under five hundred dollars.

(q) *Commonwealth v. Kosloff*. 5 Serg. & Rawle, 545.

(r) *Mannhardt v. Soderstrom*. 1 Binn. 143.

original jurisdiction in all cases affecting consuls ; and even if such jurisdiction is not to be considered exclusive, yet the 9th and 11th sections of the act of 24th September, 1789, excluded the State Courts, in such case, in express terms.(s)

6. Jurisdiction of the District Court in proceedings to repeal patents.

By the 10th section of the act of February 21st, 1793, upon oath or affirmation being made before the Judge of the district Court where the patentee his executors administrators or assigns reside, that any patent, which shall be issued in pursuance of this act, was obtained surreptitiously, or upon false suggestion and motion made to the said Court within three years after issuing the said patent, but not afterwards, it shall and may be lawful for the Judge of the said District Court, if the matter alleged shall appear to him to be sufficient, to grant a rule that the patentee his executor, administrator, or assign show cause, why process should not issue against him to repeal such patent. And if sufficient cause shall not be shewn to the contrary, the rule shall be made absolute, and thereupon the said Judge shall order process to be issued against such patentee or his executors administrators, or assigns, with costs of suit. And, in case no sufficient cause shall be shewn to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such Court for the repeal of such patent, and if the party at whose complaint the process issued, shall have judgment given against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed by the Court and recovered in due course of law.

It seems the proceedings upon the rule *nisi*, are

(s) United States v. Ravara. 2 Dall. 277. But see *ante*, Supreme Court, &c.

not conclusive; and that the process to be awarded, upon making the rule absolute, is not a final process, but a judicial writ, in the nature of a *scire facias* at common law; and this has been the practical exposition of the statute. The trial of issues of fact joined on such *scire facias* is to be by jury: as the act of 24th September, 1789, sect. 9, declares, that the mode of trial of all issues of fact in the District Court shall be by jury, except civil causes of admiralty and maritime jurisdiction.(t)

7. Equity jurisdiction of the District Court, *habeas corpus* &c.

By the 1st section of the act of February 13th, 1807, the Judges of the District Courts of the United States shall have as full power to grant writs of injunctions, to operate within their respective districts, as is now exercised by any of the Judges of the Supreme Court of the United States, under the same rules, regulations, and restrictions, as are prescribed by the several acts of Congress establishing the judiciary of the United States, any law to the contrary notwithstanding. *Provided*, that the same shall not, unless so ordered by the Circuit Court, continue longer than to the Circuit Court then next ensuing; nor shall an injunction be issued by a district Judge in any case, where the party has had a reasonable time to apply to the Circuit Court for the writ.

The act of 24th September, 1789, section 14, vests in the Judges of the District Courts, power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment.(u) Other acts give them powers to issue writs, make rules, take depositions, &c.(x) The acts of Congress already treated

(t) *Stearns v. Berret*. Mason, 164. 166.

(u) *Ante*, 65.

(x) *Ante*, 19. 21, 22. 48. 65.

of relating to the privileges of not being sued out of the district of which the defendant is an inhabitant or in which he is found, restricting suits by assignees, and various others, apply to the District Court as well as to the Circuit Court.^(y)

By the 9th section of the act of September 24th, 1789, the trial of issues in fact in the District Courts, in all causes, except civil causes of admiralty and maritime jurisdiction, shall be by jury.

(y) *Ante*, 103. See Supreme and Circuit Court, *Practice*, *passim*.

CHAPTER XXII.

DISTRICT COURT—CRIMINAL JURISDICTION.

By the 9th section of the act of September 24th, 1789, the District Court shall have, exclusively of the Courts of the several States, cognisance of all crimes and offences that shall be cognisable under the authority of the United States, committed within their respective districts, or upon the high seas, where no other punishment than whipping not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted. (a)

It is, therefore, the grade of punishment alone, that separates the jurisdiction of the District from that of the Circuit Courts; in other respects their jurisdiction as vested by this act, is similar.

By the same section, the District Court shall also have jurisdiction, exclusively of the Courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description above mentioned. Here, it is the character of the party, and the grade of punishment combined, that give jurisdiction.

(a) See Circuit Court, Criminal Jurisdiction.

CHAPTER XXIII.

TERRITORIAL COURTS.

THE Courts of the Territories of the United States have been created by the several acts of Congress, passed from time to time, establishing Territorial governments. At present, these Courts are organised as follows :

1. In the Territory of *Michigan*, there is a Court consisting of three Judges, any two of whom form a Court, who have a common law jurisdiction, and are appointed by the President, by and with the advice and consent of the Senate, to hold during good behaviour. The powers and duties of the magistrates, and other civil officers are to be regulated by the general assembly of the Territory.(a)

2. In the Territory of *Arkansas*, the judicial power of the Territory is vested in a Superior Court, in such inferior Courts as the legislative department of the Territory shall, from time to time, institute and establish, and in Justices of the peace. The Superior Court is composed of three Judges, who are to continue in office for the term of four years, unless sooner removed by the President. The Superior Court has jurisdiction in all criminal and penal cases, and exclusive cognisance of all capital cases, and original

(a) Ordinance for 1787, for the government of the Territory of the United States, north-west of the river Ohio. Acts of Congress, August 7th, 1789. January 14th, 1805.

jurisdiction, concurrently with the inferior Courts, and exclusive appellate jurisdiction, in all civil cases in which the amount in controversy is one hundred dollars, or upwards ; it is to be held at such time and place as the legislative department directs, *provided*, that any *two* of the Judges shall constitute a Court of appellate, and any *one*, a Court of original jurisdiction. These Judges are appointed by the President, by and with the advice and consent of the Senate ; the Judges of the inferior Courts, and magistrates, by the Governor.(b)

3. In *Florida*, the judicial power is vested in two Superior Courts, and in such inferior Courts, and Justices of the peace, as the legislative council of the Territory may establish. One Superior Court is for East Florida, to consist of one Judge ; another for West Florida, to consist of one Judge. Each Court has jurisdiction in all criminal cases, and exclusive jurisdiction in all capital cases, and original jurisdiction in all civil cases of the value of one hundred dollars, arising under, and cognisable by the laws of the Territory. The Judges of the Superior Courts are appointed by the President, by and with the advice and consent of the Senate. All judicial officers are to hold their offices for four years. The Judges of the inferior Courts, and magistrates are appointed by the Governor. Each of the Superior Courts has, moreover, the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which by the act of September 24th, 1789, was vested in the Court of Kentucky district.(c) And writs of error and appeals from the decisions in the said Superior Courts, may be taken to the Supreme Court of the United States, in the same cases,

(b) Act of March 2d, 1819.

(c) See *ante*, 194.

and under the same regulations, as from the Circuit Courts of the United States.(d)

By the act of March 3d, 1805, the Superior Courts of the several Territories of the United States, in which a District Court has not been established by law, shall *in all cases which the United States are concerned*, have and exercise, within their respective Territories, the same jurisdiction and powers, which are by law given to, or may be exercised by the District Court of Kentucky district, and writs of error and appeals shall lie from decisions therein to the Supreme Court, for the same causes, and under the same regulations, as from the said District Court of Kentucky. This act at present, it seems, extends to the Superior Courts of the Territories of Michigan, and Arkansas; writs of error and appeals from the Superior Courts of Florida, being provided for by the above mentioned act of March 30th, 1822.(e)

By the act of April 18th, 1806, the provisions of the act entitled "an act for providing compensation for the marshals, clerks, attorneys, jurors, and witnesses, in the Courts of the United States, and to repeal certain parts of the act therein mentioned, and for other purposes," passed February 28th, 1799, are extended to the Territories of the United States, so far as the said act may relate to the provisions of the act entitled, "an act to extend the jurisdiction, in certain cases to the Territorial Courts," passed March 3d, 1805,(f) excepting that the clerks of the said Territorial Courts shall not receive the additional five dollars per day, allowed to the clerks of the Circuit and District Courts, by the 3d section of the act first above mentioned.(g)

(d) Act of Congress, March 30th, 1822. *Ante*, 30.

(e) See *ante*, 30.

(f) The act next above mentioned.

(g) See also *ante*, 134.

CHAPTER XXIV.

MARSHAL.

By the 27th section of the act of September 24th, 1789, a marshal shall be appointed in and for each district, for the term of four years, but shall be removable from office at pleasure; whose duty it shall be, to attend the District and Circuit Courts, when sitting therein, and also the Supreme Court, in the district in which that Court shall sit, and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty, and to appoint, as there shall be occasion, one or more deputies, who shall be removable from office by the Judge of the District Court, or the Circuit Court sitting within the district, at the pleasure of either. And, before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself, and by his deputies, before the Judge of the District Court, to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district Judge, in the sum of twenty thousand dollars, and shall take, before said Judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office.

"I A. B. do solemnly swear, or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of _____ under the au-

thority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal, (or marshal's deputy, as the case may be) of the district of _____ during my continuance in said office, and take only my lawful fees. So help me God."

The 7th section of the act of 9th June, 1794, enacts, that so much of the above act, as is, or may be, construed to require the attendance of all the marshals at the Supreme Court, shall be, and the same is hereby repealed: and that the said Court shall be attended, during its session, by the marshal of the district only, in which the Court shall sit, unless the attendance of the marshals of other districts shall be required by special order of the said Court.

If a person is confined by process from an inferior Court of the United States, the marshal, by an original writ from the Supreme Court, might be directed to take him into custody, and might confine him, under this writ, in the same gaol, if unable to give bail.(a)

The marshal may be directed by the Supreme Court, to return a writ directed to him, by a certain day, and, in case of default, to shew cause by affidavit.(b) And an attachment lies against him, for non-performance of his official duties.(c) He is bound to serve an attachment issued against a witness for non-attendance in pursuance of a *subpæna*, as it is the process of the Court. regularly issuing for the administration of justice.(d)

By the 28th section of the act of September 24th, 1789, in all causes wherein the marshal or his deputy

(a) *Ex parte, Bollman v. Swartwout.* 4 Cranch, 96.

(b) *Oswald v. New York.* 2 Dall. 402.

(c) See 7 Cranch, 276.

(d) *United States v. Burr,* 365.

shall be a party, the writs and precepts therein, shall be directed to such disinterested persons, as the Court, or any Justice or Judge thereof, may appoint, and the person so appointed is thereby authorised to execute and return the same.^(c) And in case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed, and shall execute the same, in the name of the deceased, until another marshal shall be appointed and sworn. And the defaults or misfeasances in office of such deputy or deputies, in the mean time, as well as before, shall be adjudged a breach of the condition of the bond, given as before directed, by the marshal who appointed them. And the executor or administrator of the deceased marshal shall have like remedy, for the defaults and misfeasances in office of such deputy or deputies, during such interval, as they would be entitled to, if the marshal had continued in life, and in the exercise of his said office, until his successor was appointed and sworn or affirmed. And every marshal or his deputy, when removed from office, or when the term for which the marshal is appointed shall expire, shall have power, notwithstanding, to execute all such precepts, as may be in their hands respectively, at the time of such removal or expiration of office. And the marshal shall be held answerable for the delivery to his successor of all prisoners, which may be in his custody at the same time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody, until his successor shall be appointed, and qualified as the law directs.

By the 1st section of the act of April 10th, 1806, the bond heretofore given, or which may hereafter be given, by the marshal of any district, for the faithful performance of the duties of his office, shall

(c) See *ante*, 115.

be filed and recorded in the office of the clerk of the District Court or Circuit Court sitting within the district for which such marshal shall have been appointed, and copies thereof, certified by the clerk under the seal of the said Court, shall be competent evidence, in any Court of justice. By sect. 2. it shall be lawful, in case of the breach of the condition of any such bond, for any person, persons, or body politic thereby injured, to institute a suit upon such bond, in the name and for the sole use of such party, and, thereupon, to recover such damages as shall be legally assessed, with costs of suit, for which execution may issue, for such party, in due form; and, in case such party shall fail to recover in the suit, judgment shall be rendered, and execution may issue for costs in favour of the defendant or defendants, against the party who shall have instituted the suit: and the United States shall in no case be liable for the same. By sect. 3. the said bond shall, after any judgment or judgments rendered therein, remain as a security for the benefit of any person persons, or body politic, injured by the breach of the condition of the same, until the whole penalty shall have been recovered, and the proceedings shall always be in the same manner as herein before directed. By sect. 4. all suits on marshals' bonds, if the right of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards; and all such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards. Saving, nevertheless, the rights of infants, feme coverts, and persons *non compos mentis*, so that they sue within three years after their disabilities are removed.

Where the bond is for the marshal's faithful performance, during his continuance in office, his sureties

are liable for money received by him under an execution after the giving of the bond, and before he went out of office. But they were held not liable for monies received by him under an execution at the suit of the United States, anterior to the date of the bond, which were retained by him afterwards, though he was directed by the Comptroller of the Treasury, before receiving them, to pay them into bank to the credit of the Treasury of the United States: but the majority of the Court who decided this differed in their reasons: two Judges holding, that no demand appearing on the record to have been made on the marshal, for the sums, either by rule of Court, or otherwise, no conversion was made out: the other two Judges holding that the conversion was complete by his not paying them into bank agreeably to the directions of the Comptroller of the Treasury, and these being given prior to the bond, the defendants were not liable. On the question, whether, on such bond, the sureties were liable for monies received by the marshal after he had been dismissed from office, under an execution levied and executed by him, while in office, two of the Judges were of opinion they were not liable for the conversion; two thought no conversion appeared, as he was not demanded to pay the same into Court: and two were of opinion that the marshal, being authorised to do certain acts after his removal from office, the condition of the bond embraced defaults committed after dismissal from office, as well as before. A payment by the marshal of sums levied under an execution at the suit of the United States, or delivery of bonds, the property of the United States, to the district attorney, by the order of the Comptroller of the Treasury, is good, and, it seems, is available upon trial, without a previous submission to the accounting officers.(f)

(f) United States v. Giles. 9 Cranch, 212.

Payments made by the marshal, on account of money levied for the use of the United States, without directions as to their application, are not to be applied in the way most beneficial for the parties; but the United States have a right to apply them, in a mode most beneficial for them.(g)

On the 23d September, 1789, Congress resolved, that it be recommended to the legislatures of the several States, to pass laws, making it expressly the duty of the keepers of their jails, to receive and safe keep therein, all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in the case of prisoners committed under the authority of such States respectively: the United States to pay for the use, and keeping of such jails, at the rate of fifty cents per month, for each prisoner that shall, under their authority, be committed thereto, during the time such prisoner shall be therein confined; and also, to support such of said prisoners as shall be committed for offences.

By the 5th section of the act of February 25th, 1799, it shall be lawful for the Judge of any District Court of the United States, within whose district any contagious or epidemical disease shall, at any time, prevail, so as, in his opinion, to endanger the life or lives of any person or persons confined in the prison of such district, in pursuance of any law of the United States, to direct the marshal to cause the person or persons confined as aforesaid, to be removed to the next adjacent prison, where such disease does not prevail, there to be confined, until he, she, or they may safely be removed back to the place of their first confinement; which removals shall be at the expense of the United States.

A resolution of Congress passed the 3d March, 1791, directs, that in case any State shall not have complied with the above recommendation of the 23d September, 1789, the marshal in such State, under the direction of the Judge of the district, be authorised to hire a convenient place, to serve as a temporary jail, and to make the necessary provision for the safe keeping of prisoners, committed under the authority of the United States, until permanent provision shall be made by law for that purpose; and the said marshal shall be allowed his reasonable expenses incurred for the above purpose, to be paid out of the Treasury of the United States. By another resolution of Congress, passed on the 3d March, 1821, where any State or States, having complied with the recommendation of Congress, in the resolution of the 23d of September, 1789, shall have withdrawn, or shall hereafter withdraw, either in whole, or in part, the use of their jails, for prisoners committed under the authority of the United States, the marshal in such State or States, under the direction of the Judge of the district, shall be, and hereby is authorised and required, to hire a convenient place to serve as a temporary jail, and to make the necessary provision for the safe keeping of prisoners committed under the authority of the United States, until permanent provision shall be made by law for that purpose, and the said marshal shall be allowed his reasonable expenses incurred for the above purposes, to be paid out of the Treasury of the United States.

Where a State has passed a law, in consequence of the resolution above mentioned, making the keeper liable to pains and penalties, the marshal, under the 28th section of the act of 1789, is not liable for the escape of a debtor from the State jail, to which he has committed him, under civil process, from a Court of the United States. The keeper of the State jail is

neither in fact nor in law, the deputy of the marshal. Nor is he under the command or direction of the marshal. The keeper may become responsible, and may expose himself, by misconduct, to the pains and penalties imposed by the law. For certain purposes, and to certain intents, the State jail, lawfully used by the United States, may be deemed to be the jail of the United States, but not so as to make him responsible for escape from it.^(k)

If the State gaol be detrimental to the prisoners health, and inconvenient, the Circuit Court may order the marshal to prepare a place of custody, and remove a prisoner thereto, who is indicted for treason, and to employ a guard; and, it seems, the expense of such guard is a legal charge on the Treasury of the United States.⁽ⁱ⁾ But if there be a public jail, not unreasonably distant, nor unfit for the reception of the prisoner, the Court, if called upon on the part of the United States, will commit a prisoner to its keeping, provided he be there in the custody, and under the sole conduct of the marshal of the district, and that the marshal shall have authority to admit any person or persons to visit the prisoner, that the marshal may think proper.^(k) That is, it seems, where the State has passed a law, permitting to the United States the use of such public gaol.^(l)

By the 4th section of the act of 8th May, 1792, the marshal shall have the custody of all vessels and goods seized by any officer of the revenue, and shall be allowed such compensation therefor, as the Court may judge reasonable. And there shall be paid to the marshal the amount of the expense for fuel, candles, and other reasonable contingencies, that may accrue in holding the Courts within his district, and

^(h) *Randolph v. Donaldson*. 9 Cranch, 86.

⁽ⁱ⁾ *United States v. Burr*. 351. 358. 366.

^(k) *Ib.* 358.

^(l) See the argument. 9 Cranch, 80, as to Virginia.

providing the books necessary to record the proceedings thereof, and such amount, as also the compensation aforesaid, to the grand and petit jurors, to the witnesses summoned on the part of the United States, to the clerk of the Supreme Court for his attendance, to the clerks of the District and Circuit Courts, for their travelling and attendance, to the attorney of the district for travelling to Court, to the marshal for his attendance at Court, for summoning grand and petit jurors, and witnesses, in behalf of any prisoner to be tried for a capital offence, for the maintenance of prisoners confined in gaol for any criminal offence, and for the commitment or discharge of such prisoner, and also the legal fees of the clerk, attorney, and marshal, in criminal prosecutions, shall be included in the account of the marshal, and the same having been examined and certified by the Court, or one of the Judges of it, in which the service shall have been rendered, shall be passed in the usual manner, at, and the amount thereof paid out of the Treasury of the United States to the marshal, and by him shall be paid over to the persons entitled to the same; and the marshal shall be allowed two and a-half per cent. on the amount by him to be paid over, to be charged in his future account.^(m)

The act of April 16th, 1817, makes particular provisions as to the duties of the marshal, clerk, and district attorney, relative to the proceeds of prizes captured by the public armed ships of the United States, and sold under the order of the proper prize Court, by interlocutory or final decree.

As to monies deposited in Court, see Circuit Court practice.

The officers of Court who have the custody of pro-

^(m) As to his duties in summoning jurors, See *post*. Chapter XXV. The act of 28th February, 1799, sect. 2, contains a provision as to swearing his deputies at a distance.

perty, pending process, are responsible for good faith, and reasonable diligence. If the property be lost, or injured, by a negligent or dishonest execution of their trust, they are liable in damages; but they are not, of course, liable, because an embezzlement or theft is proved. They must be affected with culpable negligence, or fraud, and such is the confidence the Court places in its officers, that, perhaps, the proof of such negligence or fraud ought to be thrown on the other party. What degree of negligence may be properly required, in trusts of this nature, whether that diligence which a prudent man uses about his own affairs, and the omission of which is deemed ordinary negligence, or whether responsibility only attaches to fraud or gross negligence, the *dolus et negligentia dolo proxima* of the civil law, is not determined.(n)

It is a great irregularity in the marshal, in a proceeding *in rem*, in admiralty, to keep the property, or its proceeds, in his hands, or to undertake to distribute the same among claimants, without the order of the Court: but where this was done with honest views, and without notice of a latent claim, and with the assent and ratification of the parties interested, the Court would not, after a lapse of time under the circumstances of the case, hold him responsible for such claim.(o)

The marshal or any officer, may have an attachment to compel the payment of fees due to him.(p)

By the 9th section of the act of 28th February, 1795, the marshals of the several districts, and their deputies, shall have the same powers in executing the laws of the United States, as sheriffs, and their deputies, in the several States, have by law, in executing the laws of the several States.

(n) *Burke v. Trevitt*. Mason, 100.

(o) *Anon.* 2 Gall. 101.

(p) *The Collector.* 6 Wheat. 194.

CHAPTER XXV.

PROCEEDINGS IN CRIMINAL CASES.

By the 4th article of the amendments to the Constitution, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated : and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Commitment and Bail.

By the 33d section of the act of September 24th, 1789, for any crime or offence against the United States, the offender may, by any Justice or Judge of the United States, or by any Justice of the peace or other magistrate of any of the United States where he may be found, (a) agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested. and imprisoned, or bailed, as the case may be, for trial before such Court of the United States as, by this act, has cognisance of the offence. And copies of the process shall be returned. as speedily as may be. into the clerks office of such Court, together with the recognisances of the witnesses for their appearance to testify in the case ; which recognisances the magistrate before whom the examination shall be, may require, on pain of imprisonment. And if such commitment

(a) See *post*. Jurisdiction of State Courts and Magistrates.

of the offender or the witnesses shall be in a district other than that in which the offence is to be tried, it shall be the duty of the Judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender and the witnesses, or either of them, as the case may be, to the district where the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the Supreme or a Circuit Court, or by a Justice of the Supreme Court or a Judge of the District Court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and usages of law. And if a person committed by a Justice of the Supreme, or a Judge of the District Court for an offence not punishable with death, shall afterwards procure bail, and there be no Judge of the United States in the district to take the same, it may be taken by any Judge of the Supreme or Superior Court of law of such State. By the 14th section of the act of March 2d, 1793, bail for appearance in any Court of the United States in any criminal cause in which bail is by law allowed, may be taken by any Judge of the United States, any Chancellor, Judge of a Supreme or Superior Court, or chief or first Judge of a Court of Common Pleas, of any State or mayor of a city, in either of them, and by any person having authority from a Circuit Court, or the District Courts of Maine and Kentucky, (b) to take bail, which authority, revo-

(b) These Courts are since altered. See *ante*, 28. 30. 96. 194. and Territorial Courts. By the 3d section of the act of March 2d, 1793, the District Courts of Maine and Kentucky shall have like power to hold special sessions, for the trial of criminal cases, as hath been heretofore given, or is hereby given, to the Circuit Courts, subject to the like regulations. See *ante*, 132, 133.

By the 12th section of the act of 24th September, 1789, remo-

cable at the discretion of such Court, any Circuit Court, or either of the District Courts of Maine or Kentucky, may give to one or more discreet persons learned in the law, in any district for which such Court is holden, where, from the extent of the district and remoteness of its parts from the usual residence of any of the before named officers, such provision shall, in the opinion of the Court, be necessary. *Provided* that nothing herein shall be construed to extend to taking bail in any case where the punishment for the offence may be death ; nor to abridge any power heretofore given by the laws of the United States to any description of persons to take bail.

Although the act of September 24th, 1789, does not expressly invest the *Courts* of the United States, sitting as Courts, with the power to commit a person charged with an offence against the United States, yet this power is implied in the duties which the Courts must perform. And the Court may also take bail in such case(*c*)

To warrant a commitment, that proof would not be required which would be necessary to convict the person on a trial in chief; but the committing magistrate would require, that probable cause should be shewn. Probable cause is a case made out by proof, furnishing good reason to believe, that the crime alleged has been committed by the person charged. When such probable cause is shewn, it can be done away only by its appearing that no such crime has been committed, or that the suspicion entertained of the prisoner is wholly groundless.(*d*) If on a charge of treason, a suspicion has been created by the proof, that a military

vals were authorised from State Courts, to the next District Courts of Maine and Kentucky, under the same regulations as to Circuit Courts. See *ante*, 123. 126.

(*c*) United States v. Burr. Trial, 80.

(*d*) United States v. Burr. Trial, 80.

force has been embodied, yet it is done away, if the government has had it in its power, and had time to produce proof of that fact, and does not produce such proof, and no reason is given for the nonproduction.(e)

A magistrate or Court may commit upon affidavits made before another magistrate ; inasmuch as, before the accused is put on his trial, all the proceedings are *ex parte*.(f) Still such affidavit, taken *ex parte*, will always be viewed with some suspicion, and acted upon with some caution. If it were obvious, that the attendance of the witness was easily attainable, but that he was intentionally kept out of the way, it seems, it would not be sufficient.(g) There is a difference between the strictness of law, in relation to proof applicable to a trial in chief, and that which is applicable to a motion to commit for trial ; but there is some limit to the relaxation ; and it will not be extended so far, as to admit a paper purporting to be an affidavit, which is not shewn to be one. It must be an absolute oath : not a probable one. The oath must be a legal oath ; and must legally appear to the Court to be so.(h) On the question whether that part of an affidavit which purports to be as nearly the substance of a letter from the accused to the witness as the latter could interpret it, where the letter is not produced, but the witness is at too great a distance to admit of its being obtained, is good evidence on a question of commitment for treason, the Supreme Court was equally divided in opinion.(i)

A warrant of commitment is illegal, which does not

(e) *Ex parte*, *Bollman v. Swartwout*. 4 Cranch, 128.

(f) *United States v. Burr*, 97.

(g) *United States v. Burr*, 15, 17.

(h) *Ib.* 99.

(i) *Ex parte*, *Bollman and Swartwout*. 4 Cranch, 130. See *Records and Laws, post*.

state some good cause certain, supported by oath. And if such commitment was in the first instance by Justices, and on a *habeas corpus* before the Circuit Court there was a hearing, in which that Court remanded the prisoner, yet if it appear that they acted entirely on the proceedings before the Justices, and did not proceed *de novo*, nor correct the error, the Supreme Court, on a second *habeas corpus*, will discharge the party: and if there be really a good cause of commitment, the Justices may proceed *de novo*, taking care that their proceedings are regular.(k)

A refusal by the magistrates, for want of probable cause, to commit for treason, does not detract any thing from the right of the United States attorney to prefer an indictment for treason, should he be furnished with the necessary evidence.(l) Nor is it a reason why the Court should not commit, that a grand jury is sitting, competent to receive and determine a bill of indictment on the charge, where the evidence justifies a commitment. The commitment is not made for the sole purpose of bringing the accused before a grand jury; it is to subject him personally to the judgment of the Court, to which the grand jury is only the first step.(m) And if the attorney of the United States were about to send up a bill to the grand jury, he might move that the person he designed to accuse should be ordered into custody, and it would be in the discretion of the Court to grant or reject the motion.(n)

Although a motion has been made to commit a person for treason, and on a hearing the Judge rejected the application, because the testimony against him was not sufficient, yet another motion may be made at a

(k) *Ex parte, Burford*. 5 Cranch, 447.

(l) *United States v. Burr*, 18.

(m) *Ib.* 80.

(n) *Ib.* 81.

future day to commit the person on the same charge, if new evidence be obtained.(o)

On a motion to commit for treason no evidence of a treasonable intent will be received, till the fact of treason having been committed is first proved,(p) but it is otherwise on the trial of an indictment for treason.(q)

The 34th section of the act of 1789, prescribing, that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the Courts of the United States, in cases where they apply, does not, it seems, refer to criminal proceedings. The laws of the several States are not to be regarded as rules of decision on trials for offences against the United States. The words "trials at common law" apply to civil suits as contradistinguished from criminal prosecutions, as well as to suits at common law as contradistinguished from those which come before the Court sitting as a Court of Equity or Admiralty. At any rate it is certain, that this section does not apply to original process in criminal cases, for commitment of a person, against whom a bill of indictment is found in a Court of the United States. That case is provided for by the 14th section of the act of 1789, authorising the Courts to issue writs necessary for the exercise of their respective jurisdiction. As therefore the 33d section of the act of 1789, provides for an arrest in the first instance, a *capias* or bench warrant may issue from the Court, to arrest a person against whom a bill of indictment is found for libel or misdemeanor, that he may be committed, or held to bail,

(o) United States v. Burr, 81.

(p) United States v. Burr, Trial, 96.

(q) Ib. 469. See post.

though, by the law of the State, a summons issues in such cases in the first instance. If already in custody, an order of the Court may be made in lieu of it.^(r) It seems after indictment found by the grand jury for treason, the Court will not bail the party indicted.^(s) And the circumstances must be very strong which will at any time induce the Court to admit a person to bail who stands charged with treason.^(t) If the trial of a prisoner, indicted for treason, be postponed on his motion, to give him time to send for witnesses, and the case cannot afterwards be tried, owing to want of time in the Court, it is not a reason for admitting him to bail, although the day before the adjournment he intimated his design to proceed to trial.^(u)

Query, how far a Court or magistrate has power to demand security for a further hearing, where there is not some evidence of probable cause.^(x)

As to the place at which the accused is to be committed for trial, the Constitution, art. iii. sect. 2, 3, provides, that the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed ; but, when not committed within any State, the trial shall be at such place or places as Congress may by law have directed. And by art. vi. of the amendments, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been com-

^(r) United States v. Burr, 185. 117.

^(s) Ib. 312.

^(t) United States v. Stewart. 2 Dall. 345. See United States v. Hamilton. 3 Dall. 17.

^(u) United States v. Stewart. 2 Dall. 344.

^(x) United States v. Burr, 165.

mitted, which district shall have been previously ascertained by law. By the 29th section of the act of September 24th, 1789, in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. By the 33d section of the same act, (before stated) offenders are to be arrested and imprisoned, or bailed, as the case may be, for trial before such Court of the United States as by that act has cognisance of the offence ; and copies of the process shall be returned, as speedily as may be, into the clerks office of such Court, together with the recognisances of the witnesses for their appearance to testify in the case, and if such commitment of the offender or the witnesses shall be in a district other than that in which the offence is to be tried, it shall be the duty of the Judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. The 8th section of the act of 30th April, 1790, inflicts a punishment on any person or persons who shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder, robbery, &c. and provides that the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought. In some other acts of Congress the place of trial of specified crimes is designated, as piracy, &c.

On these acts it has been decided that the 8th section of the act of 30th April, 1790, applies only to

offences committed on the high seas, or in any river, haven, basin, or bay, not within the jurisdiction of any particular State. In those cases there is no Court which has particular cognisance of the crime, and, therefore, the place in which the criminal shall be apprehended, or, if he be apprehended where no Court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offence was committed, and has jurisdiction. But if a tribunal for the trial of the offence, wherever it may have been committed, has been provided by Congress, and at the place where the prisoners were seized there existed such a tribunal, such tribunal has jurisdiction and the accused cannot be transported to a different district for trial. The word "apprehended" is not confined in its meaning to a seizure by the civil magistrate; it embraces a military seizure: and in neither case is there any right in the person seizing to select the place of trial, and direct them to be carried there. Therefore, where prisoners were first apprehended in the territory of Orleans, on a charge of treason committed in that territory, or its neighbourhood, by an armed force under the orders of the commander in chief of the army of the United States, and transported to the District of Columbia for trial, it not being alleged that any offence was committed in the District of Columbia it was held, that the Circuit Court of the District of Columbia had not jurisdiction.^(y) And it is not in the power of a Circuit Court of a district composed of a State, to commit for trial in a territory of the United States.^(z)

Sureties of Peace.

By the 1st section of the act of 16th July, 1798,

(y) *Ex parte, Bollman v. Swartwout*. 4 Cranch, 135.

(z) *United States v. Burr*. Append. 2d part 211.

the Judges of the Supreme Court, and of the several District Courts of the United States, and all Judges and Justices of the Courts of the several States having authority, by the laws of the United States, to take cognisance of offences against the Constitution and laws thereof, shall, respectively, have the like power and authority to hold to security of the peace, and good behaviour, in cases arising under the Constitution and laws of the United States, as may or can be lawfully exercised by any Judge or Justice of the peace of the respective States, in cases cognisable before them.(a)

Juries.

By the 29th section of the act of September 24th, 1789, in cases punishable with death, the trial shall be had in the county where the offence was committed, or, where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence.

The acts of 24th September, 1789, sect. 29, February 28th, 1799, sect. 6. May 13th, 1800, sect. 1. and April 29th, 1802, make other provisions as to juries in civil and criminal cases.(b)

The words of reference in the act of September 24th, 1789, sect. 29, to the laws of the State were held to be restricted to the mode of designating the jury by lot or otherwise, and to the qualifications requisite for jurors, but not to relate to the number of jurors. The number, therefore, not being fixed by the act of Congress, nor any State rule adopted by it, it must depend on the common law, by which the Court may direct any number to be summoned, on a consideration of all the circumstances under which the *venire* is issued. As the precept for the petit jury

(a) See *post*. Jurisdiction of State Courts, and Magistrates, and Constitution, art. i. sect. 8. 3. Art. iii. sect. 1. 1. *post*.

(b) *Ante*, 167, 168.

in these cases, which were charges of treason, directed the marshal to return at least forty-eight, he was held to have a discretion as to the number beyond that, (there being no other order of the Court), and that the number of seventy-two jurors summoned in each case was not excessive. It seems, also, that the most proper and legal mode of proceeding is, to issue a *venire* in each case, and then there must of course be a separate panel returned, in conformity to every writ. And where the marshal to each *venire* returned sixty jurors from the counties in and near the place of holding the Court, and twelve from the county in which the treason was charged to have been committed, it was held good.^(c) In a subsequent case in Pennsylvania a *venire* tested the 11th October, 1798, and returnable the 11th April, 1799, had issued, by which, the marshal was commanded to summon "not less than forty eight, and not exceeding sixty, to serve as petit jurors." The marshal returned sixty jurors from the city and county of Philadelphia, and on a separate paper seventeen jurors from Northampton county, (the place where the treason was alleged to have been committed), and twelve from Bucks county. No *venire* had issued for the two latter returns, nor did any special award appear on the record, and the jurors that tried the prisoner were from all the three counties. The district Judge had verbally ordered the return of the additional jurors. IREDELL, J. gave no opinion, but thought the objection to the panel by the prisoners counsel, that the proceedings were not according to the act of Congress was not insurmountable. PETERS J. thought the proceedings correct.^(d)

In a later case, it seems to have been held, that where a State law has fixed the number of grand jurors, the Circuit Court of the United States is govern-

^(c) United States v. Insurgents. 2 Dall. 335.

^(d) United States v. Fries. 3 Dall. 515.

ed by such law as to the number. No more can be summoned by the marshal, and the deficiencies of the panel can be supplied only from the bystanders. If a person is regularly put on the panel of the grand jury and summoned, he stands there, and cannot be displaced by the marshal. The marshal cannot substitute another in his stead. If he substitute another, such other cannot be considered as being on the panel, and the first may come into Court, and on proving that he was actually summoned, would be entitled to be on the grand jury.^(d) A person under recognisance on a criminal charge, may, before the grand jury is sworn, to whom a bill of indictment is to be sent, except to an irregularity in summoning part of the panel of the grand jury.^(e)

It seems, that the part of this act which requires twelve jurors to be summoned from the county where the offence was committed, is in force, notwithstanding the adoption, after the passage of this act, of the 6th amendment of the Constitution requiring the trial of the accused to be before an impartial jury of the State and district where the crime was committed; for they are not incompatible.^(f)

If only four jurors are obtained from the original panel of forty-eight, in consequence of challenges by the defendant for favour, an additional panel of forty-eight may be awarded by the Court.^(g)

By the 29th section of the act of 30th April, 1790, if any person or persons be indicted of treason against the United States, and shall stand mute, or refuse to plead, or shall challenge peremptorily above the num-

(d) *United States v. Burr.* Trial, 37. See a decision of TALLMADGE D. J. on this subject, referred to, 3 Hall's Law Journ. 121. It is believed, that it was afterwards overruled by VAN NESS D. J.

(e) *United States v. Burr.* Trial, 37.

(f) *United States v. Burr.* Trial, 353.

(g) *United States v. Burr.* Trial, 354. 382. 420, 421.

ber of thirty-five of the jury ; or if any person or persons be indicted of any other of the offences herein before set forth for which the punishment is declared to be death, if he or they shall also stand mute, or will not answer to the indictment, or challenge peremptorily above the number of twenty persons of the jury, the Court, in any of the cases aforesaid, shall, notwithstanding, proceed to the trial of the person or persons so standing mute, or challenging, as if he or they had pleaded not guilty, and render judgment thereon accordingly.

In murder, and other crimes (except treason) set forth in this act, the prisoner can challenge only twenty : but in offences created since that act, where the penalty is death, the prisoner is entitled to challenge thirty five, as at common law. The words, " herein before set forth," confine the provision to the offences described in that act. (h)

Under the provisions of the Constitution, and of the common law, requiring an impartial jury in criminal cases, those who have deliberately formed and delivered an opinion, that the party is guilty of the crime charged against him, are disqualified to serve as jurors. Having formed an opinion of any fact conducive to the final decision of the case, would not disqualify. But if the opinion formed be on a point so essential, as to go far towards a decision of the whole case, and to have a real influence on the verdict, it seems, it would disqualify. Thus, on a charge of treason, it seems, it would not be a sufficient objection to a juror that he did believe, and had said, that the prisoner, at a time considerably anterior to the fact charged in the indictment, entertained treasonable designs against the United States. But if he had made up and declared the opinion, that to the time when the fact laid in the indictment is said to

(h) United States v. Johns. 4 Dall. 414.

have been committed, the prisoner was prosecuting the treasonable design with which he is charged, it is a sufficient cause of challenge. So, in homicide; whether the fact of killing is admitted or is doubtful, if a juror should have made up and delivered an opinion, that though uninformed as to the fact of killing, he was confident of the malice, he was confident that the prisoner had deliberately formed the intention of murdering the deceased, and was prosecuting that intention up to the time of his death, it seems it would be a sufficient cause of challenge. So, on the charge of passing counterfeit bank notes, knowing them to be counterfeit, if the juror had declared, that though uncertain as to the fact of passing the notes, he was confident the prisoner knew them to be counterfeit, it would be a sufficient objection.⁽ⁱ⁾ Where, however, the character charged, and the circumstances, are so universally notorious that it is obviously and totally impossible to obtain a jury, whose minds are not already made up, perhaps the rule may be relaxed, so far as necessity requires. But, if this necessity does not exist, the rule will be adhered to.^(k) These cases, it is to be observed, suppose the opinion formed from reports and newspaper publications: whether an opinion formed by a juror on his own knowledge, is good cause of challenge, *query*.^(l)

Grand jurors as well as petit jurors may be challenged for favour;^(m) and in Burr's case the Court established the following as the proper questions to be put to the jurors: first, have you made up your mind on the case, or on the guilt or innocence of the accused, from the statements you have seen in the

⁽ⁱ⁾ United States v. Burr. 416, 417, 418.

^(k) Ib. 419.

^(l) Ib. 419. See also *Mima and child v. Hepburn*. 7 Cranch, 290, *ante*.

^(m) United States v. Burr. 38.

thereof, shall, and they are hereby authorized and required, immediately upon his request, to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours: and every such person or persons, accused or indicted of the crimes aforesaid, shall be allowed and admitted, in his or their defence, to make any proof, that he or they can produce by lawful witness or witnesses, and shall have the like process of the Court, where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

Though this act applies only to capital cases, yet persons charged with offences not capital, have a Constitutional and legal right to examine their testimony, and this act is to be considered as declaratory of the common law, in cases where this constitutional right exists. The word, *or*, is to be taken disjunctively, and any person, charged with a crime in the Courts of the United States, has a right, before as well as after indictment, to the process of the Court, to compel the attendance of his witnesses; and the *subpoena* in such case is to be returnable at the term when the indictment is to be tried.^(u)

Query, whether an attachment is the proper process, to compel the attendance of witnesses, or a process to punish.^(x)

By the 5th section of the act of May 8th, 1792, in every prosecution for any fine or forfeiture, incurred under any statutes of the United States, if judgment is rendered against the defendant, he shall be subject to the payment of costs. And on every conviction, for any other offence not capital, the Court may, in their

(u) United States v. Burr. Trial, 180.

(x) United States v. Ogden and Smith. See *ante*, 161.

discretion, award that the defendant shall pay the costs of prosecution.(y)

Military Expeditions.

By the act of April 20th, 1818, sect. 6, if any person shall, within the territory or jurisdiction of the United States begin, or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign Prince, or State, or of any colony, district, or people, with whom the United States are at peace, every person, so offending, shall be deemed guilty of a high misdemeanor, and shall be fined, not exceeding three thousand dollars, and imprisoned, not more than three years. This act repeals the act of 5th June, 1794, the 5th section of which is similar to this section, except that it does not contain the words, "or of any colony, district, or people."(z)

Under this act, the crime consists, not in intention, but in acts. The act of Congress does not extend to the secret design, if not carried into open deed, nor to any conspiracy, however extensive, if it do not amount to a beginning, or setting on foot, a military expedition. The issue, on an indictment containing no charge of conspiracy, is, whether the particular facts charged were committed.(a)

It seems, a single individual may commit the crime forbidden by this act.(b)

In misdemeanors punishable by statute, describing, as the sole offender, the person who commits the prohibited act, the principal is within the act, the ac-

(y) *Ante*, 219.

(z) See *Ex parte*, *Bollman v. Swartwout*. 4 Cranch, 136. See *Commitment and Bail*, *ante*, 240.

(a) *United States v. Burr*. Trial. Append. 2d part 191.

(b) *Ib.*

cessary is not. One, therefore, who counsels or procures the acts mentioned in this law, is not indictable as committing the acts; nor, on an indictment so charging him, can the acts of the principal be given in evidence, except to shew the character and object of the expedition.(c)

Where the defendant was indicted for beginning a military expedition in the county of Wood, in the State and district of Virginia, to be carried on from thence against the dominions of a foreign Prince at peace with the United States, and for there setting on foot a military enterprise against his territories, and providing the means for a military enterprise, it was held,

1. That on such indictment, the third persons, not forming a part of the transactions, and not made in the presence of the accused, cannot be received in evidence.

2. That any legal testimony, shewing the character and objects of the expedition, as, for instance, respecting the arms and provisions, no matter by whom purchased, the conduct of the parties concerned or their public declarations, or marching against the foreign territory, any manifesto to this effect, or agreement among themselves for such expedition, are evidence.

3. The acts of accomplices, except so far as they prove the character and objects of the expedition, are not evidence. The accomplice is responsible himself; and he who procures or advises the act is an accessory, and he is not punishable as a principal, under the act.

(c) United States v. Burr. Trial. Append. 2d part 191.

4. The acts of the accused in a different district, constituting in themselves substantive cause for a prosecution, cannot be given in evidence, unless they go directly to prove the charges laid in the indictment. Providing means in Kentucky, was, therefore, held not evidence on this indictment: though the declarations of the defendant in Kentucky, that he had provided means in Wood county, would be.

5. Orders given in Kentucky, by the defendant, and means provided in consequence thereof in Virginia, are evidence on this indictment; if those orders were given to persons not accomplices, and not guilty, under the act, themselves; but if they are accomplices, it is otherwise.^(d)

Perjury.

By the 18th section of the act of April 30th, 1790, if any person shall wilfully and corruptly commit perjury, or shall by any means, procure any person to commit wilful and corrupt perjury, on his or her oath or affirmation, in any suit, controversy, matter, or cause depending in any of the Courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person, so offending, and being thereof convicted, shall be imprisoned, not exceeding three years and fined, not exceeding eight hundred dollars, and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the Courts of the United States, until such time as the judgment so given against the said offender shall be reversed.

An indictment, charging the perjury to have been committed on the hearing of a certain complaint against A. B. and others, for piracy, "depending before the

^(d) United States v. Burr. Trial. Append. part 189.

Hon. J. D. then, and ever since, being Judge of the District Court of the United States, for the district of Massachusetts, and a magistrate of the United States," is not good under this act. The act applies only to suits, &c, depending in *Court*, and that should be stated. Nor would a charge of perjury in a deposition, be good, unless it was stated in the indictment, that it was taken pursuant to the laws of the United States. The word deposition means written testimony, and cannot be construed to include a verbal oath.(e)

Larceny.

By the 16th section of the act of 30th April, 1790, if any person, within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with an intent to steal or purloin, the personal goods of another, or if any person or persons, having at any time hereafter the charge or custody of any arms, ordnance, munition, shot, powder, or habiliments of war belonging to the United States, or of any victuals provided for the victualling of any soldiers, gunners, mariners, or pioneers, shall, for any lucre or gain, or wittingly, advisedly, and of purpose to hinder or impede the service of the United States, embezzle purloin, or convey away any of the said arms, ordnance, munition, shot, or powder, habiliments of war, or victuals, then, and in every of the cases aforesaid, the person or persons so offending, their counsellors, aiders, and abettors, (knowing of and privy to the offences aforesaid), shall, on conviction, be fined, not exceeding the fourfold value of the property so stolen, embezzled, or purloined: the one moiety to be paid to the owner of the goods, or the United States, as the case may be, and the other moiety to the informer and prosecutor,

(e) United States v. Clark. 1 Gall. 497.

and be publicly whipped not exceeding thirty-nine stripes.

It is not larceny, punishable under this act, if committed on board an American vessel lying in an enclosed dock, in a foreign country, not being on the high seas.(f)

(f) United States v. Hamilton. Mason, 152.

CHAPTER XXVI.

UNITED STATES COURTS—COMMON LAW JURISDICTION.

How far the Courts of the United States can exercise criminal jurisdiction, over offences at the common law, not declared such nor made punishable, by any act of Congress, is a question on which a contrariety of opinion is to be found. It arose at an early period after the adoption of the Constitution. In the year 1798, Gideon Henfield, a citizen of the United States, was arrested for engaging at Charleston, in the service of the French Republic, and afterwards committing hostilities in a French vessel, on the high seas, against the enemies of France, with whom the United States were at peace, and had treaties; there being, then, no act of Congress forbidding such acts. The attorney general of the United States, (E. Randolph), on the application of the Secretary of State, gave an opinion, that Henfield was punishable, because treaties were the Supreme law of the land, and by treaties with three of the powers at war with France, it was stipulated, that there should be a peace between their subjects and the citizens of the United States: and that he was indictable at the common law, because his conduct came within the description of disturbing the peace of the United States. Henfield was afterwards indicted, and tried at Philadelphia but was acquitted.(a)

(a) 1 Wait's State Papers, 85, 86. 143. See 2 Dall. 391, 392, arg. 5 Marsh. Life of Washington, 434, 435. The charges to the grand juries delivered by JAY C. J. and WILSON J., the former at Richmond in May, 1793, and the latter at Philadelphia in

An indictment in the Circuit Court against the defendant, (a consul from Genoa,) for sending anonymous and threatening letters to the British minister and, other individuals, with a view to extort money, was sustained, in the year 1794, on the ground of its being an offence at common law.(b) In the year 1798, a defendant was convicted in the Circuit Court, of attempting to bribe the commissioner of the revenue, an officer under the Treasury department of the United States, to give him a contract for building a light house, which was to be erected under a law of the United States, and, on a motion in arrest of judgment, the Court were divided in opinion. CHASE J. held, that the indictment was not sustainable, as Congress had not defined the offence, nor prescribed a punishment, and that no common law authority, was vested in the Courts of the United States, as to crimes and punishments. PETERS D. J. held, that the Courts of the United States were constitutionally possessed of a common law power to punish misdemeanors, and that the indictment was good. Sentence of fine and imprisonment was passed on the defendant by the Court. The question was not carried up to the Supreme Court, there being then no law that provided for its being done by certificate, where the opinions of the Judges were opposed, and the prisoners counsel declining to remove the case by consent.(c)

In the case of Isaac Williams, an American citizen, who was indicted in Connecticut, in the year 1799, in the Circuit Court for accepting a commission from the French Republic, in Guadaloupe, to cruize against

July, 1793, are to the same effect, as the above mentioned opinion. They are contained in The Philadelphia Daily Advertiser, of the year 1793. Congress, by the acts of 5th June, 1794, and 14th June, 1797, made provision for cases of a similar description.

(b) United States v. Ravara. 2 Dall. 297. JAY C. J. and PETERS Dist. J.

(c) United States v. Worrall. 2 Dall. 384.

the British, and also for capturing a British vessel, contrary to the 31st article of the treaty with Great Britain, the defendant set us as a defence a naturalization by the laws of France in 1792, and a residence there from that time, during part of which he was in public service in the French navy, ELLSWORTH C. J. declared, that the common law of this country remains the same as it was before the Revolution; that the defendant could not dissolve the compact which bound him to allegiance, without the default or consent of the community: neither of which appeared; and that the evidence was irrelevant, and ought not to go to the jury, LAW D. J. *dubitante*, and the defendant was convicted and sentenced to fine and imprisonment, on both indictments.(d)

This jurisdiction was not asserted in any case afterwards for several years. In the year 1812, it was adjudged, by a majority of the Supreme Court, that before criminal jurisdiction can be exercised, Congress must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence. It was, therefore, held, that an indictment at common law, could not be supported in the Circuit Court, for a libel on the President and Congress of the United States.(e) But it would seem from a subsequent case, in the year 1816, that the point is not settled by this decision. For where the defendant was indicted in the Circuit Court, for forcibly rescuing a prize, that had been captured during the war, by two American privateers, and the question was, whether the Circuit Court had jurisdiction over common law offences against the United States, on which question the Judges of the Circuit Court were

(d) 4 Hall's Law Journ. 361. See the act of 14th June, 1797. and *post*.

(e) United States v. Hudson and Goodwin. 7 Cranch, 32. See United States v. Passmore. 4 Dall. 374.

divided,(c) although one of the Justices, (JOHNSON), stated, that he considered the question settled by the foregoing case, the other Justices present seem not to have so considered it, and it was stated, that a difference of opinion existed among the members of the Court, on the point; but, the attorney general declining to argue it, the Court certified in conformity with the decision in the *United States v. Goodwin*.(d)

(c) See the reasons of STORY J. at large in favour of the jurisdiction, *United States v. Coolidge*. 1 Gall. 488. 502.

(d) *United States v. Coolidge*. 1 Wheat. 416. See *United States v. Gill*. 4 Dall. 426. *United States v. Burr*. 4 Cranch, 501. *Commonwealth v. Schaeffer*. 4 Dall. Append. XXXI. *Commonwealth v. Kosloff*. 5 Serg. and Rawle. 545. Observations of BLAND J. 12 Niles's Reg. 377. 461. *United States v. Bevans*. 3 Wheat. 336. *United States v. Wiltherger*. 5 Wheat. 76. *Tucker's Black*. vol. i. part 1. 378.

CHAPTER XXVII.

JURISDICTION OF STATE COURTS AND MAGISTRATES.

The Constitution of the United States was ordained and established, not by the States in their sovereign capacity, but emphatically, as the preamble pronounces, by the people of the United States. They could invest the government of the Union with any power they pleased, and could restrain or prohibit the exercise of any power by the State governments, if deemed expedient. They could reserve to themselves those sovereign authorities, which they did not choose to delegate. The Constitution was not necessarily carved out of existing State sovereignties, or a surrender of power already existing in them : but a new distribution by the hands of the people, so far as respected the government of the Union, leaving unimpaired, in other respects, the State Governments. Thus the 10th article of the amendments declares, that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. (a) The basis of the government is, that the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness. These principles are fundamental, and designed to be permanent. (b)

(a) *Martin v. Hunter's lessee*. 1 Wheat. 325. *McCulloch v. Maryland*. 4 Wheat. 404.

(b) *Marbury v. Madison*. 1 Cranch, 176. 5 Wheat. 48.

The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance also to State authority and State legislation, a mere grant of such powers in affirmative terms to Congress, does not, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the *exclusive* legislation delegated to Congress, over places purchased by the consent of the legislature of the State in which the same shall be, for forts, arsenals, dock-yards, &c; of the second class, the prohibition of a State to coin money, or emit bills of credit; of the third class, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases, not falling within the classes already mentioned, the States retain concurrent authority with Congress, not only upon the letter and spirit of the 10th article of the amendments of the Constitution, but upon the soundest principles of general reasoning.^(c) There is this reserve, however, that in cases of concurrent authority, where the laws of the States and of the United States are in direct and manifest collision on the same subject, those of the United States, being the Supreme law of the land, are of paramount authority, and the State laws so far, and so far only, as such incompatibility exists, must necessarily yield.^(d) So, it is declared to have been general-

(c) *Houston v. Moore*. 5 Wheat. 48. Per STORY J.

(d) *Ib.*

ly held, that the State Courts have concurrent jurisdiction with the Courts of the United States in cases to which the judicial power is extended, unless the jurisdiction of the Courts of the United States be rendered exclusive by the words of the third article of the Constitution.(e) How far the jurisdiction of the Federal Courts is rendered exclusive by the words of the third article of the Constitution, is not specifically stated, except, as we have seen, that it is exclusive as to all cases of admiralty and maritime jurisdiction.(f) But, it is said, that Congress have power to make the jurisdiction of the Courts of the United States exclusive in all cases to which the judicial power of the United States is extended by the Constitution, and, throughout the act of September 24th, 1789, have legislated on that supposition.(g)

It seems, the United States, in the course of legislation upon the objects entrusted to their direction, may commit the decision of causes arising under a particular act to the Courts of the United States solely, if deemed expedient; but in every case in which the State Courts are not expressly excluded by act of Congress, they may take cognisance of causes growing out of such act.(h) Congress cannot confer

(e) *Cohens v. Virginia*. 6 Wheat. 396. Per MARSHALL C. J.

(f) *Martin v. Hunter's lessee*. 1 Wheat. 337. See *Houston v. Moore*. 5 Wheat. 1.

(g) *Martin v. Hunter's lessee*. 1 Wheat. 337. See *Houston v. Moore*. 5 Wheat. 26. *Cohens v. Virginia*. 6 Wheat. 397. By the 11th section of the act establishing Circuit Courts, passed the 13th February, 1801, now repealed, (*ante*, 93,) the cognisance of all penalties and forfeitures accruing under the laws of the United States, was vested in the Circuit Courts, exclusively of the State Courts, where the offence was committed within fifty miles of the place of holding the Circuit Courts. See also sect. 13.

(h) *Houston v. Moore*. 5 Wheat. 26. STORY J., however, excepts all cases of admiralty and maritime jurisdiction. These, he considers vested by the Constitution exclusively in the Courts of

jurisdiction upon any Courts but such as exist under the Constitution and laws of the United States ; but the State Courts may exercise jurisdiction in cases authorised by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal Courts.(i)

The criminal jurisdiction vested by the act of September 24th, 1789, in the Courts of the United States, in cases arising under the judicial power granted by the Constitution, was made, by that act, exclusive of all State jurisdiction. Still it seems, Congress may vest in the State Courts criminal jurisdiction over these cases, concurrent with that of the United States Courts. But to vest this jurisdiction, an act of Congress must expressly authorise it : for, as the jurisdiction of the Circuit and District Courts was, by the act of September 24th, 1789, made exclusive in criminal cases, cognisable under the authority of the United States, unless otherwise provided, it was necessary for Congress, by another law, to declare the jurisdiction in offences of this description not exclusive. Thus, the acts punishing forgery of the notes of the bank of the United States,(k) and for counterfeiting the current coin of the United States,(l) were accom-

the United States. *Ib.* 49. See *Martin v. Hunter's lessee.* 1 Wheat. 330. *Cohens v. Virginia.* 6 Wheat. 396.

(i) *Houston v. Moore.* 5 Wheat. 27, 28. But see the opinions of JOHNSON and STORY J. in that case. To confer the power of determining such causes, (causes arising out of the national Constitution,) upon the existing Courts of the several States, would, perhaps, be as much, "to constitute tribunals," as to create new Courts with like power. *Federalist*, No. 81. I am inclined to suppose, that Congress are not restrained from vesting the cognisance of any case, comprehended under those heads, (controversies to which the United States are a party, and all trials for offences against the Constitution or laws of the federal government,) in the State Courts, should they find it advisable so to do, especially in fiscal proceedings, and lesser offences against the peace. *Tucker's Black.* vol. i. part i. page 482.

(k) 24th February, 1807. April 10th, 1816.

(l) 21st April, 1806.

panied with a *proviso*, that nothing therein contained should be construed to deprive the Courts of the individual States of jurisdiction under the laws of the several States, of offences made cognizable therein. *(m)*

Where the jurisdiction of the United States Court and of a State Court is concurrent, the sentence of either Court, whether of conviction or acquittal, may be pleaded in bar to a prosecution in the other, with the same effect as a judgment of a State Court in a civil case may be pleaded in bar, in an action for the same cause, in a Circuit Court. *(n)*

Where the violation of an act of Congress necessarily involves with it a violation of a State law, as if the citizens of a State oppose the execution of a law of Congress with force, and in so doing violate also a State law, *query*, whether they can be subjected to two indictments, and two punishments, one for a breach of the act of Congress, and another for a breach of the State law. *(o)*

By various acts of Congress, duties have been imposed on State magistrates and Courts, and they have been vested with jurisdiction in civil suits, and in complaints and prosecutions for fines, penalties, and forfeitures, arising under laws of the United States. *(p)*

(m) Houston v. Moore. 5 Wheat. 26. 30. See, however, the opinions of JOHNSON and STORY J. and the case put by JOHNSON J. 5 Wheat. 34, as to robbery of the mail.

(n) Houston v. Moore. 5 Wheat. 31.

(o) See the opinion of CHASE J. 1 Hall's Journ. of Jurisprudence, 262, and the cases above cited.

(p) Houston v. Moore. 5 Wheat. 28. See the judicial act, 24th September, 1789, sect. 30, 33. Act relative to seamen, July 20th, 1790, sect. 2, 3, 4, 5, and to the fisheries, June 19th, 1813, sect. 1. Act relative to fugitives, February 12th, 1793. Act for laying duties on licences, 5th June, 1794, sect. 3. Act for remissions of penalties, &c. March 3d, 1797, sect. 3. The stamp act of July 6th, 1797, sect. 20. Act relative to contested elections, January 23d, 1798. Act for the relief of the refugees, April 7th, 1798, sect. 3. Act relative to sureties of the peace, 16th July,

and, in civil suits, the State Courts entertain such jurisdiction. Thus, bonds given to the United States for duties may be sued in the State Courts, where the act of Congress prescribes that they may be prosecuted in the proper Court having cognisance thereof: for the act of 24th September, 1789, sect. 9, and 11, makes the jurisdiction of the State Courts concurrent with those of the United States, where the United States are plaintiffs.(q)

But, in penal and criminal cases, the State Courts have, in several instances, declined exercising such jurisdiction, though expressly vested by act of Congress. In a case which occurred in the State of Ohio in the year 1803, the Court was equally divided on the question, and the jurisdiction was sustained.(r) But in a subsequent case, in the same State, an information was filed by the collector of the revenue for the 6th collection district of Ohio, in the St. Clairsville Court of Common Pleas of that State, against the defendant, for selling domestic distilled spirits without a licence therefor from the collector, contrary to the act of Congress, praying a forfeiture to the United States under the act, and the defendant excepted to the jurisdiction of the Court, and also to the mode of proceeding. The Court decided, that the United

1791, sect. 1. (*ante* 248.) The collection law, of March 2d, 1799, sect. 20, 36, 68. Act establishing Circuit Courts, 13th February, 1801, sect. 11. Act relative to the Indian tribes, 30th March, 1802, sect. 16. Naturalization Act, 14th April, 1802. Acts to extend Jurisdiction in certain cases to State Judges and State Courts, March 8th, 1806, and 21st April, 1808. Act regulating the Post Office Establishment, 30th April, 1810, sect. 35. Acts of July 24th, and August 2d, 1813, laying duties. Act of March 3d, 1815, to vest more effectually in the State Courts, and in the District Courts of the United States, jurisdiction in the cases therein mentioned.

(q) *United States v. Dodge.* 14 Johns. Rep. 25. The act of March 3d, 1815, is to the same effect. *ante*, 222.

(r) *Worthington v. Masters.* 1 Hall's Journ. of Jurisprudence, 196.

States could not make use of the State Courts, to enforce their penal laws, and that the proceeding by information was a criminal proceeding, and contrary to the Constitution of the State.(s) So, where an action of debt was brought in the Supreme Court of the State of New York, to recover a penalty of one hundred and fifty dollars under the act of Congress, passed the 2d August, 1813, entitled an act for laying duties on licences to retailers of wines, spirituous liquors, and foreign merchandizes, which authorised the suit to be brought in a Court of that State, and the defendant pleaded to the jurisdiction of the Court, the Court (PLATT J. diss.) determined in favour of the defendant, holding, that it was not competent to Congress to confer jurisdiction on the State Courts, in criminal or penal cases arising under the laws of the United States.(t)

Where the defendant was indicted in a State Court in Virginia, in the name of the Commonwealth, for stealing packets from the mail, it was determined, that as the offence was created by an act of Congress, a State Court had no jurisdiction.(u)

So, where an action of debt was brought in a Court of the State of Virginia, to recover a penalty, inflicted by the act of Congress to insure the collection of the revenue of the United States, which penalty the act declared might be recovered in a State Court, the case being adjourned to the general Court of Virginia, it was held, that the act of Congress was, in this respect, unconstitutional, and to assume jurisdiction over the case, would be to exercise a portion of the judi-

(s) *United States v. Campbell*. 6 Hall's Law Journ. 113. As to informations, See *ante*, 210.

(t) *United States v. Lathrop*. 17 Johns. 5.

(u) *Commonwealth v. John Feely*. Virginia Cases, 321. The act of Congress of 30th April, 1810, authorises such prosecutions in the State Courts. See sect. 35.

cial power of the United States, which by the Constitution, is deposited in other hands.(x)

In the case of Almeida, who was committed in the State of Maryland by a Justice of the peace of that State, on a charge of piracy, and brought up on *habeas corpus* directed to the marshal, it was held, by the Judges, BLAND and HANSON, that Congress could not constitutionally invest the judicial officers of that State with any portion of the judicial power of the United States, in any criminal case whatever, and, therefore, could not use the judicial officers of the States as agents, to arrest and bring offenders to justice, such agency being a judicial act. They therefore held the 33d section of the act of September 24th, 1789, by which such authority is given to be unconstitutional and the acts done under it, by a state magistrate, null and void, and, discharged the prisoner.(y)

But in a subsequent case, the prisoner, who was brought up before Judge CHEVES, in South Carolina, on a *habeas corpus* directed to the marshal of that district, had been committed by a Justice of the peace of that State, on a charge of forging protections for American seamen, which was an offence against the laws of the United States, the Judge decided among other things, that granting a warrant of commitment was a ministerial, not a judicial act; that Congress had a right to constitute any citizen of the United States a conservator of the peace, though also conservators of the State, and that, in relation to the case before him, the 33d section of the act of September 24th, 1789, was constitutional; and he remanded the prisoner.(z)

(x) Jackson v. Row. Nat. Intell. Dec. 23. 1815.

(y) Case of Joseph Almeida. 12 Niles's W. Reg. 115. 213.

(z) Ex parte Rhodes. 12 Niles's W. Reg. 255. See remarks of Judge BLAND, ib. 376. And see the case of Commonwealth v. Holloway. 5 Binn. 512.

So where three American seamen entered on board of an American vessel at Boston, having signed the shipping articles, and afterwards deserted in Virginia, and were there committed to jail by a Justice of the peace of the county of Henrico, in that State, by virtue of the 7th section of the act of Congress of the 20th July, 1790, making it "lawful for any Justice of the peace within the United States," to act in such case, a *habeas corpus* was taken out before a Judge of the Superior Court, and was adjourned to the general Court, who came to no definitive conclusion on the question, whether the act of commitment, as required by the 23d section of the act of September 24th, 1789, was, strictly, ministerial only, or partook in part of the judicial character, but the majority of the Court, decided, that whether strictly ministerial or not, commitments made under and pursuant to the 7th section of the act of 20th July, 1790, were lawful and right: that such commitments were not intended by the Constitution to be vested exclusively in the Courts of the United States; that special powers, partaking of a judicial nature, may be given by, and exercised under the acts of Congress, without making the persons exercising them Courts of the United States; and that the act might be done by individuals appointed by law, or designated by general description. But the Court declared their opinion, that Congress could not give jurisdiction to, or require services of, any officer of the State government, as such.(a)

(a) *Ex parte Pool and others*. Nat. Intell. Nov. 10th and Dec. 11, 1821. It is to be observed, however, in this case, that the Court remark, that the imprisonment directed by this act of Congress is for no determinate period, (it being till the vessel is ready to depart, or the master require the seaman's discharge;) that it is not inflicted as a punishment, and is not directed with a view to any trial for any offence whatever. They could not, therefore, regard the execution of this act, as the prosecution of a public offence. See *post*. Constitution, art. iii. s. 1. 1.

Under what circumstances, and how far, Judges of a State Court have power to issue a *habeas corpus*, and decide as to the validity of a commitment or detainer under the authority of the United States, seems to have been variously determined in the State Courts.

Where the parties imprisoned stated, in their petition to the State Judge for a *habeas corpus*, that they were confined in fort M'Henry, near Baltimore, without the authority of law, and it appeared on the return of the writ, that they had been arrested by General Wilkinson, (commander in chief of the army of the United States,) at New Orleans, on suspicion of being connected with Burr, in treasonable practices, and had been transported by sea to that place, to wait the order of the Secretary at War, and that they were private citizens, not subject to military authority, and there was no proof against them, NICHOLSON C. J. held, that as General Wilkinson had no right to arrest them, his inferior officers had no right to detain them, and acted without even the colour of authority, and he discharged them.^(b) But, where a *habeas corpus* had issued from the same Judge, on a petition stating, that Emanuel Roberts had been seized, and forcibly carried on board the brig Syren, (an United States armed vessel,) and there detained, the Judge stated, that if the fact had so appeared, the relator must have been discharged, and the parties implicated held to bail, to answer a criminal prosecution. But it appearing, that the relator, a boy of 16, had voluntarily enlisted in the service of the United States, received wages in advance, though it was contended that the enlistment was irregular, the Judge held, that he could not call the United States before him, to inquire into the nature of the contracts between them and individuals, unless, perhaps, in an extreme case; and that

(b) Cited in the case of Emanuel Roberts. 2 Hall's Law Journ. 195, in Maryland, (1809.)

the whole proceeding being under the Constitution and laws of the United States, he had no right to interfere.(c)

So, where application was made to the Supreme Court of the State of New York, for a *habeas corpus* to an officer of the army of the United States, to bring up the body of a person stated, by affidavit, to be an enlisted soldier, and that he was an infant of the age of 17, and had enlisted without his father's consent, who prayed his release, the Court refused to allow the writ. KENT C. J. declared, that the enlistment being under colour of the authority of the United States, and by an officer of that government, the Courts of the United States had complete jurisdiction over the offence of unlawful imprisonment in such case, and the State Courts had none: in which case, the State Courts had no jurisdiction by *habeas corpus*. That a State Court would not inquire into the validity or regularity of process, where a person was detained by the marshal, under colour of process. THOMPSON J. concurred, on the ground that the party might have relief from a Judge of the Circuit or District Court: but would not disclaim having jurisdiction in any case, where the imprisonment or restraint was under colour of the authority of the United States. The other Judges concurred in refusing the writ, but reserved the question of jurisdiction.(d)

So, in the case before mentioned where a prisoner was arrested by a warrant from a justice of the peace of the State of South Carolina, on a charge of counterfeiting protections of American seamen, an offence against the laws of the United States, and brought up on *habeas corpus* before Judge CHEVES, and it was contended, that the magistrate who committed him had no authority to commit for an offence against the

(c) Case of Emanuel Roberts. 2 Hall's Law Journ. 195, (1809.)

(d) Matter of Ferguson. 9 Johns. Rep. 239.

United States, because the 33d section of the judicial act of September 24th, 1789, vesting such power, was unconstitutional, the Judge held, that he had no jurisdiction over the case, that the criminal jurisdiction under the laws of the United States was expressly exclusive, and that as a State Court had no authority to take cognisance of the offence charged, so as to punish or acquit, it could not take jurisdiction under a *habeas corpus*, or declare an act of Congress unconstitutional and void.(e)

On the other hand, the decisions in other States seem different. A *habeas corpus* was issued by TILGHMAN C. J. of the Supreme Court of Pennsylvania, directed to the marshal of that district, on the return of which it appeared, that the relator was in his custody by virtue of an attachment, issued by the District Court of the United States for the Pennsylvania district, to compel the performance of a decree of that Court for the payment of money. It was contended, on behalf of the defendant, that the Chief Justice had not a right to discharge the relator, even if he should be clearly of opinion that the District Court had no jurisdiction of the suit in which the attachment issued. The Chief Justice declared that if the District Court had jurisdiction, he had no right to inquire into its judgment, or interfere with its process: if it had not, in his opinion, he would possess the right, and it would be his duty to discharge the relator, in such case. If Congress should pass a bill of attainder, or lay an export duty, such laws would be null and void, and the judicial authority of a State might declare them so. But this power should be exercised with very great caution, and never, where there is a reasonable cause for doubt. He then went on to examine, whether the District Court had jurisdiction, and

(e) Ex parte Andrew Rhodes. 12 Niles's W. Reg. 264, (1819.)

decided, that they had, and ordered the relator to remain in custody. (f)

So, where on a *habeas corpus* from the Supreme Court of Pennsylvania, to the keeper of the gaol of Philadelphia, it appeared, that the prisoner was detained under a warrant of commitment by an alderman of that city, upon a charge of misprision of treason against the United States, it was held by that Court, that if, under the 33d section of the act of 1789, a person be committed by a State Justice or Judge, for an offence against the United States, the Supreme Court might issue a *habeas corpus*, and admit to bail or discharge, as the case required, unless he were chargeable with an offence punishable with death. The Court heard the evidence, and fixed the bail for the party's appearance at the next Circuit Court. (g) And in a subsequent case in the same Court, the relator, being imprisoned by the marshal of the district as an alien enemy, under the regulations made by the President of the United States, in pursuance of the act of the 6th July, 1798, respecting alien enemies, it was held, that a State Court or Judge might award a *habeas corpus*, in conformity to the law of the State, to enquire into the cause of his commitment, and that this writ lies to relieve a person imprisoned under colour of authority derived from the United States, as well as from any other imprisonment. Prisoners of war, however, are excepted: they are not entitled to the privilege of a writ of *habeas corpus*: but the relator was not to be considered a prisoner of war. And the Court declared, that this authority to award a *habeas corpus* is one remaining in the States, ema-

(f) *Ex parte Elizabeth Sergeant executor, &c.* 8 Hall's Law Journ. 206, (1809.)

(g) *Commonwealth v. Holloway.* 5 Binn. 512. See also *Commonwealth v. Murray.* 4 Binn. 487.

nating from the States, and not from the United States, and Congress had not attempted to exclude it.(h)

So where, on *habeas corpus* from the Supreme Judicial Court of Massachusetts, the defendant returned, that the relator was duly enlisted as a soldier in the army of the United States, the Court declared, that it had authority to inquire into the circumstances under which any person, brought before them by *habeas corpus*, was confined, or restrained of his liberty, and it appearing, that the relator was a foreigner, under age, and that he had enlisted without the consent of his parent or guardian, they declared the supposed enlistment to be void, and set the party at large.(i)

Where a *habeas corpus* issued from a State Court of Maryland, directed to the marshal of that district, to bring up a citizen of the United States committed by a Justice of the peace of that State, on a charge of piracy, the Court, consisting of Judges BLAND and HANSON, decided, that the Court had jurisdiction to issue such writ, and decide upon it, unless it appeared by the return, that the case had been constitutionally placed under the exclusive cognisance of the United States; and that if the authority of the officer committing were unconstitutional and void, the prisoner must be discharged. But to justify this decision, the case should be a clear one. They proceeded to enquire into the authority of the committing magistrate, and decided, that he could not constitutionally commit, for an offence against the United States, and discharged the prisoner.(k)

So also, it was held in the year 1821, by the general Court of Virginia, that the writ of *habeas corpus* may be issued by a State Judge, on the application of

(h) Case of Lockington. 5 Hall's Law Journ. 92. 313.

(i) Commonwealth v. Harrison. 11 Mass. Rep. 63, (1814.)

(k) Case of Joseph Almeida. 12 Niles's W. Reg. 115. 231.

any party, who by proper affidavit, shews probable cause, that he is unlawfully restrained of his liberty; that the question whether the law authorises his confinement, is to be decided by the laws of the State, considered as a member of the United States; and that the Court is at liberty to consider all persons as lawfully restrained of their liberty, who are confined in obedience to the constitutional laws of the State or United States. In the practical application of these principles, the State Judges will not discharge a party, whose commitment is *regularly* made with a view to a prosecution in the Courts of the United States for an offence actually committed, and cognisable therein; neither will the Judges of the State Courts, as such, admit the party to bail. Whether they will look beyond the warrant of commitment, when made by any other than a Judge of the Courts of the United States, and enquire into the fact, is a matter of sound discretion, to be regulated by the circumstances of the case. But the State Courts and Judges have concurrent jurisdiction with the Courts and Judges of the United States, in all cases of illegal confinement under colour of the authority of the United States, when that confinement is not the consequence of a suit or prosecution pending in the Courts of the United States, in which the allegation, upon which the commitment is made, will be tried.⁽¹⁾

It seems that from a decision on a *habeas corpus*, in a case arising under the laws of the United States, no appeal lies to the Supreme Court of the United States, under the present provisions enacted by Congress. Yet, it seems, the subject is within the constitutional power of Congress, and they might enact regulations providing for an appeal from such decisions,

(1) Ex parte Pool and others. Nat. Intell. Nov. 10th and Dec. 11th, (1821.)

in cases arising under the Constitution, laws, and treaties.^(m)

It has been decided, that a State Court could not issue a mandamus to the register of a land office of the United States in Ohio, commanding him to issue a final certificate of purchase to the plaintiff, for certain lands in that State, to which the plaintiff laid claim under the laws of the United States. A State Court cannot grant such mandamus to an officer of the United States, whatever may be its powers derived from its organization, or the laws of the State. The officers of the United States, employed in disposing of the land of the United States, can only be controlled by the power that created them : and though Congress have declined vesting the Courts of the United States with power, in such case, to issue a mandamus, it does not follow that such power results to the State Courts. It was, therefore, held, where the same attempt that had been made to obtain a mandamus in the Circuit Court, to compel the register to grant a certificate, was afterwards renewed in the Supreme Court of the State of Ohio, and that Court sustained the jurisdiction, that they had no authority to issue a mandamus in such case.⁽ⁿ⁾

The act of March 3d, 1815, which gave jurisdiction to certain State Courts and magistrates, over suits for penalties, &c. arising in the collection of the direct tax and internal revenue of the United States, provided, that final decrees or judgments therein, in the State Courts should be re-examined in the Circuit Court agreeably to the 22d section of the act of 1789.

In matters which Congress is, by the Constitution, authorised to regulate, the State Courts are often controlled by the provisions of acts of Congress, operating on cases within the jurisdiction of the State Courts,

(m) Case of Lockington. 4 Hall's Law Journ. 96.

(n) M'Clung v. Silliman. 6 Wheat. 598.

and pending before them. Thus, for example, the act for the collection of duties, passed 2d March, 1799, sect. 71, gives double costs to an officer, or other person, sued for seizing goods under the collection law, in certain cases. The further acts on the same subject, of 24th February, 1807, and March 3d, 1815, exempt them from costs, action, or execution, when the Court gives a certificate of reasonable or probable cause. So the Stamp Acts of 6th July, 1797, sect. 13, and 2d August, 1813, sect. 7, declared, that no instrument, charged with duty, should be pleaded or given in evidence, in any Court, unless stamped. The act to establish a general stamp office, passed the 23d April, 1800, sect. 6, directed, that such instrument should be evidence after a certain indorsement and certificate. The act of 3d March, 1817, authorised any collector, &c. sued for any thing done under the act of March 3d, 1815, to remove the cause to the next Circuit Court, under the same regulations as if the suit were between citizens of different States.(o)

The State legislatures cannot annul the judgments of the Courts of the United States, or destroy the rights acquired under those judgments.(p) Nor can the States, by any compact between themselves, deprive the Supreme Court of appellate jurisdiction, where it is granted by the Constitution and laws.(q)

(o) See *ante*, 123. Observations of BLAND J. 12 Niles's W. Reg. 377.

(p) *United States v. Peters.* 5 Cranch, 136.

(q) *Wilson v. Mason.* 1 Cranch, 91.

CHAPTER XXVIII.

Constitution. Article I.

CONSTITUTION. ART. I.—REPRESENTATIVES AND TAXES.

ART. 1. sect. 2, 3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall, by law, direct. The number of representatives shall not exceed one for every thirty thousand ; but each State shall have, at least, one representative, &c.

It was settled by Congress, on the passage of the first apportionment act in the year 1791, that the population of each State, and not the total population of the United States, must give the numbers, to which alone could be applied the process by which the number of representatives was to be ascertained. Whatever fractions, therefore, the States may have, beyond the settled proportion by which the number of representatives from each is to be regulated, no allowance can be made for them.(a)

(a) 5 Marshall's Life of Washington, 318. A former bill, which allowed Representatives for the fractions, distributing them among the States that had the largest fractions, was returned by President WASHINGTON, as not conformable to the Constitution.

Representatives and direct taxes are similar, in being subjected to the same rule of apportionment to the numbers ascertained by the census. They are, however no way connected with, or dependent upon each other. The District of Columbia, and the Territories of the United States, though not entitled to representatives in Congress, are subject to direct taxation by Congress, if they see fit; and the rule of proportion of such taxation is the same as that which is applied to the States, namely, the census or enumeration of numbers in such district or Territories, as directed to be taken by the Constitution. There is, however, this difference: that if a direct tax be laid at all by Congress, it must be laid on every State, conformably to this rule: but it need not be extended to the District of Columbia, or the Territories, if Congress do not think it expedient to do so. And the understanding and practice have been accordingly. *(b)*

It is not essential that the apportionment of representatives by act of Congress should be one entire and final act. If from accident the census should not be complete in a State, at the time of the apportionment of representatives, Congress may make a contingent regulation in the act, according to which the number of representatives may be adjusted, when the census shall be complete. This mode was adopted by the act of March 7th, 1822, in relation to the State of Alabama, in which, owing to the death of the marshal, the census was not so far completed, at the time when the representatives were apportioned by law, as that it could be ascertained, whether the share of that State would be two or more members.

Constitution. Art. 1.—Senate.

Art. 1. s. 3. 1. The Senate of the United States shall be composed of two Senators from each State,

(b) Loughborough v. Blake. 5 Wheat. 317.

chosen by the Legislature thereof for six years, and each Senator shall have one vote.

If all the States, or a majority of them, should refuse to elect Senators, the legislative powers of the Union would be suspended. But if any one State should refuse to elect them, the Senate would not, on that account, be the less capable of performing all its functions.(c)

Constitution. Art. 1.—Expulsion.

Art. 1. s. 5. 2. Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two thirds, expel a member.

The power of the Senate to expel one of its members, and the grounds upon which such a measure ought to be adopted, have been subjects of consideration in that branch, in three instances.

In March 1796, application was made to the Senate of the United States by the legislature of Kentucky, requesting an investigation by the Senate, of a charge against Humphrey Marshall, one of the members from that State, of perjury, which had been made in a pamphlet publication. A similar accusation had been made against him prior to his election as Senator, but no prosecution had been commenced for it. The Senate adopted the report of a committee declaring, among other things, that the Senate had no jurisdiction to try the charge ; that the consent of Mr. Marshall, though offered by him, could not give jurisdiction, and that the memorial should be dismissed ; although other grounds were stated, as that no prosecutor appeared and that no documents or evidence were furnished. This report states, on the subject of jurisdiction, “ that in a case of this kind, no person can be held to answer for an infamous crime, unless on a present-

ment or indictment of a grand jury, and that in all such prosecutions, the accused ought to be tried by an impartial jury of the State and district wherein he committed the offence.”(d)

But in the report of the committee of Senate in the case of John Smith, made the 31st December, 1807, this case is commented on, and it is said that there were very sufficient reasons for not pursuing the investigation, in that particular case, any further: but that the principles advanced, as to the jurisdiction of the Senate, are inaccurate. As an argument for this it is stated, that of the sixteen Senators who, in March, 1796, voted for that report, eleven, in July 1797, voted for the report which concluded with a resolution for the expulsion of Mr. Blount, and the other five Senators were no longer members of that body.(e)

William Blount was expelled from the Senate of the United States on the 8th July, 1797, being declared in the resolution of Senate, guilty of a high misdemeanor entirely inconsistent with his public trust and duty as a Senator. He was then under an impeachment by the House of Representatives, which terminated in the decision, that a Senator was not liable to impeachment. The report of the committee in his case, as adopted by Senate, stated, as reasons for the expulsion, his writing a letter evincing his attempts to seduce from his duty an United States Indian interpreter, and to employ him as an engine to alienate the affections and confidence of the Indians from the public officers residing among them: the measures he had proposed to excite a temper, which must produce the recal or expulsion of our superintendant from the Creek nation: his insidious advice, tending to the advancement of his own popularity and consequence, at the expense and hazard of the good opinion which the Indians en-

(d) Journal of Senate, 127. March 22d, 1796.

(e) 1 Hall's Law Journal, 459.

ertain of this government, and of the treaties subsisting between us and them, and concluded, that the committee had no doubt, but that his conduct had been inconsistent with his public duty, rendered him unworthy of a farther continuance of his present public trust in that body, and amounted to a high misdemeanor.(f) On this case, it has been also remarked, that the member implicated was called upon, in the first instance, to answer, whether he was the author of a letter, the *copy* of which only was produced, and the writing of which was the cause of the expulsion. He was, afterwards, requested to declare, whether he was the author of the letter itself, and declining, in both cases, to answer, the fact, of his having written it, was established by a comparison of his hand writing, and by the belief of persons who had seen him write, upon inspection of the letter. These it is argued shew the admission of a species of evidence, which, in Courts of criminal jurisdiction, would be excluded: yet, in the resolution, the Senate declared him *guilty of a high misdemeanor*, though no presentment or indictment had been found against him, and, no prosecution at law was ever commenced upon the case.(g) And, it seems no law existed, to authorise such prosecution.(h)

John Smith, a Senator from the State of Ohio, was indicted at a Circuit Court at Richmond, in the year 1807, for treason, in levying war against the United States, and for misdemeanor, in preparing an expedition against the Spanish territory in Mexico: but owing to the acquittal of Burr, the principal in the transaction, the prosecution against Smith was aban-

(f) Journal of Senate, 109. July 8th, 1797.

(g) Report in the case of John Smith. 1 Hall's Law Journal, 465.

(h) The Act of January 17th, 1800, now expired, imposed penalties for offences similar to those charged against W. Blount.

doned, a *nolle prosequi* being entered, by the district attorney of the United States. The evidence against Burr was rejected by the Court, on his trial, because, as he was not present at the overt act of treason stated in the indictment, no testimony relative to his conduct, and declarations elsewhere and subsequently could be admitted. In consequence of this decision the traverse jury found a verdict, "that Aaron Burr was not proved to be guilty under that indictment, by any evidence submitted to them." It was, also, the opinion of the Court, that none of the transactions, of which evidence was given, amounted to an overt act of levying war. The indictment against Smith was abandoned, because the same decision would prevent a conviction on it. No other indictment was ever found against him. The report of the committee of Senate in his case, made on the 31st December, 1807, concludes with a resolution to expel John Smith from the Senate, "for participation in the conspiracy of Aaron Burr against the peace, union, and liberty of the people of the United States," and embraces in its body the following points.

1. That the Senate may expel a member, for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

2. That a previous conviction is not requisite, in order to authorise the Senate to expel a member from their body, for a high offence against the United States.

3. That although a bill of indictment against a party for treason and misdemeanor, has been abandoned, because a previous indictment against the principal party had terminated in an acquittal, owing to the in-

admissibility of the evidence upon that indictment, yet the Senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds, that the party is guilty of a high misdemeanor, it is a sufficient ground of expulsion.

4. That the 5th and 6th articles of the Amendments of the Constitution of the United States, containing the general rights and privileges of the citizen as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the Senate as to expulsion.

5. That before a Committee of the Senate appointed to report an opinion, relative to the honour and privileges of the Senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, and to be confronted with his accusers. It is before the Senate, that the member charged is entitled to be heard.

6. In determining on expulsion, the Senate is not bound by forms of judicial proceedings, or the rules of judicial evidence; nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must in its nature be discretionary, and its exercise of a more summary character, than the process of judicial tribunals.(i)

Constitution. Art. 1.—Duties.

Art. 1. sect. 8. 1. Congress shall have power to lay and collect taxes, duties, imposts, and excises; but all duties, imposts, and excises shall be uniform throughout the United States.

It has been decided by the Supreme Court of the

(i) Report in the case of John Smith. 1 Hall's Law Journ. 459. J. Q. Adams, chairman. See ib. 470.

United States, that a tax on carriages is not a direct tax; and, of course, it may be laid uniformly throughout the United States, and need not be apportioned according to the census.^(k) Whether such a tax falls within the words impost, duty, or excise, seems doubtful: but it is clearly a tax which Congress have power to levy: and they may decide the mode of levying it, whether uniformly, or by apportionment.^(l) Direct taxes are stated to be only two; namely, a capitation, or poll tax, and a land tax, whether others are comprehended in these words, appears doubtful. Perhaps, the immediate product of the land, in its original and crude state, ought to be considered as the land itself, as it makes part of it. Or else, the provision, against taxing exports, would be easily eluded.^(m)

Under this clause, Congress has power to levy a direct tax, not only on the States, but also on the District of Columbia, the Territories, and generally throughout the United States, on all places to which the government extends; preserving the proportion prescribed by the 3d section of the 1st article of the Constitution. Congress is bound to extend the ordinary revenue system by indirect taxes to the District of Columbia: though it is not obliged to extend the system of direct taxation.⁽ⁿ⁾

Constitution. Art. 1.—Commerce.

Art. 1. s. 8. 3. Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Under the power to regulate commerce, Congress may adopt measures that abridge commerce, if they

(k) *Hylton v. United States*. 3 Dall. 171.

(l) *Ib.* CHASE J.

(m) *Ib.* PATERSON J.

(n) *Loughborough v. Blake*. 5. Wheat. 317.

deem them proper and necessary for the advancement of great national purposes of policy, and may apply such means in enforcing the law, as the exigency of the case requires. They have, therefore, power to lay an embargo, though not limited in its duration.(o)

By virtue of this clause of the Constitution, and of the auxiliary power given by the 17th clause of this section, to make all laws necessary and proper for carrying into execution foregoing powers, the act for the government and regulation of seamen in the merchant's service, passed on the 20th July, 1790, has been made; for without a regulation on this subject, it is not easy to perceive how this commerce, over which Congress possess the entire controul, could be carried on. It is no objection to the 7th section of the act of 20th July, 1790, that it exacts a personal service under penalty of imprisonment of the seamen, for desertion after signing a contract, as this principle is a part of the general maritime law of Europe, in relation to contracts of seamen, and must have been within the view of the framers of the Constitution.(p)

It has been held by the Court of Errors of New York, that on the subject of commerce, the States are under no other restrictions than those expressly specified in the Constitution, and such regulations as the

(o) *United States v. Brigantine William*. 2 Hall's Law Journ. 255, before DAVIS D. J. See act of June 4th, 1794. Resolution of Congress, March 26th and April 18th, 1794.

(p) *Ex parte Pool and others*, in the General Court of Virginia, in 1821. Nat. Intell. Dec. 11, 1821. The language of the act of Congress of the 20th July, 1790, sect. 1, extends only to contracts with seamen on board any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel, of the burthen of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State. It seems, there is in Virginia, an act of the Legislature, passed in 1805, providing for the case of foreign seamen only. See *Ib.*, and Hall's Law Journ. 132, remarks on the case of the deserters from the British Frigate *L'Africaine*.

national government may, by treaty, and by laws, from time to time, prescribe. The navigable waters within the territory of a State are subject to its municipal regulations, and the State may regulate their use, in the same manner as it makes laws respecting turnpike roads; toll bridges, canals, ferries, health, quarantine, &c.(q) An exclusive privilege granted by an act of the legislature of a State, for the navigation of steam boats in its waters, is not contrary to this clause of the Constitution, nor is it void, because it might, possibly, in the course of events, interfere with the power granted by this clause to Congress.(r) So it was afterwards decided, in the same Court, that a license to carry on the coasting trade, granted under the laws of the United States, did not authorise the use of a steam boat, in contravention of such act of the legislature.(s)

Constitution. Art. 1.—Naturalization.

Art. 1. sect. 8. 4. Congress shall have power to establish an uniform rule of naturalization.

In a case which arose in the year 1792.(t) the Judges of the Circuit Court, WILSON, BLAIR, and PETERS, were of opinion, that notwithstanding the act of Congress on the subject of naturalization, passed March 26th, 1790, the States, individually, still enjoyed, after the passage of that act, a concurrent authority to pass laws on the subject, but that it could not be exercised so as to contravene the rule established by Congress; and that the reason of investing Congress with the power of naturalization was, to guard against

(q) See the act of Congress, 25th February, 1799, respecting quarantine and health laws.

(r) *Livingston v. Van Inghen.* 9 Johns. 507.

(s) *Ogden v. Gibbons.* 17 Johns. Rep. 4 Johns. Ch. Cas. See 6 Wheat. 448, where an appeal was taken to the Supreme Court of the United States, but dismissed, the decree below not being final.

(t) *Collet v. Collet.* 2 Dall. 294.

the adoption of too narrow a mode of conferring it by the States, not to prevent too liberal an extension of it. They therefore dismissed a bill in equity in the Circuit Court, because the complainant was a citizen of the same State as the defendant, (Pennsylvania;) he having been naturalized on the 30th April, 1790, under a law passed in the year 1789, by the State of Pennsylvania. But in a case which arose in the year 1797, IREDELL J. intimated, that if the question had not previously occurred, he should be disposed to think, that the power of naturalization operated exclusively, *as soon as it was exercised by Congress.*^(u) It seems now, however, to be considered as settled, that by the Constitution, the power of naturalization is exclusively vested in Congress: there being a direct repugnancy, or incompatibility, with the objects of the Constitution, in the exercise of this power by the States.^(x)

The time of residence in the United States, which the policy of the government has required, to entitle an alien to naturalization, has varied considerably at different periods. The first naturalization act passed on the 26th March, 1790, required a previous residence of two years. The next act, passed on the 29th January, 1795, enlarged the time to five years. On the 18th June, 1798, the time was further extended to fourteen years: but by the act of 14th April, 1802, it was restored to the term of five years, and so continues.

The rules established by the acts of Congress, for the admission of aliens as citizens of the United States, have also been different at different periods. The first act of the 26th March, 1790, which regulated their admission during the period that elapsed from

(u) United States v. Villatto. 2 Dall. 370.

(x) Chirac v. Chirac. 2 Wheat. 269. Houston v. Moore. 5 Wheat. 49.

that time to the 29th January, 1795; the act of the 29th January, 1795, which regulated their admission until the passage of the act of 18th June, 1798, and the latter act, which was the rule until the 14th April, 1802, have all been repealed: and at present, free white aliens, in order to become citizens, must comply with different requisites, according to the time of their arrival in the United States.

Such aliens may be comprehended in four classes,

1. Those who have arrived, or may arrive since the 18th June, 1812.

2. Those who arrived between the 14th April, 1802, and the 18th June, 1812.

3. Those who arrived between the 18th June, 1798, and 14th April, 1802, or were then residing within the limits, and under the jurisdiction of the United States, and have continued to reside therein.

4. Those who were residing within the limits, and under the jurisdiction of the United States, before the 29th January, 1795.

1. An alien who has arrived, or may arrive in the United States, since the 18th June, 1812, must, on application, shew, that he has complied with the following requisites:—

1. He must have declared on oath or affirmation, before the Supreme, Superior, District, (which every Court of Record in any individual State, having common law jurisdiction, and a seal, and clerk or prothonotary, is, within the meaning of this act.(y) or Circuit Court of some one of the States, or of the Territorial

(y) Act of 14th April, 1802, sect. 3.

districts of the United States, or a Circuit or District Court of the United States, three years at least, before his admission, that it was, *bona fide*, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign Prince, Potentate, State, or Sovereignty whatever, and particularly, by name, the Prince, Potentate, State, or Sovereignty, whereof such alien may, at the time, be a citizen or subject,(z) and a certificate from the proper clerk or prothonotary, of the declaration of intention, made before a Court of Record, must be exhibited, on application to be admitted a citizen of the United States, and must be recited at full length in the record of the Court admitting such alien ; otherwise he shall not be deemed to have complied with the conditions requisite for becoming a citizen of the United States. And any pretended admission of an alien who shall have arrived within the limits and under the jurisdiction of the United States, since the 18th June, 1842, to be a citizen, without such recital of such certificate at full length, is of no validity or effect under the act of Congress.(a)

2. He must have made registry, and obtained certificate, in the following manner. If of the age of twenty-one years, he must have reported himself, if under that age, or held in service, he must have been reported by his parent, guardian, master, or mistress, to the clerk of the District Court of the district where he arrived, or to some other Court of record of the United States, or of either of the territorial districts of the same, or of a particular State : and such report must have ascertained the name, birth-place, age, nation, and allegiance, together with the country whence he or she migrated, and the place of his or her in-

(z) Act of April 14th, 1802, sect. 1.

(a) Act of March 22d, 1816, sect. 1.

tended settlement: and it is made the duty of such clerk, on receiving such report, to record the same in his office, and to grant to the person making such report, and to each individual concerned therein, whenever he shall be required, a certificate under his hand and seal of office, of such report and registry: and for receiving and registering each report of an individual or family he shall receive fifty cents: and for each certificate granted pursuant to the act to an individual or family fifty cents; and such certificate shall be exhibited to the Court as evidence of the time of the applicants arrival within the United States, (b) and must be recited at full length in the record of the Court admitting such alien: otherwise he shall not be deemed to have complied with the conditions requisite for becoming a citizen of the United States. And any pretended admission of an alien, who shall have arrived within the limits and under the jurisdiction of the United States since the 18th June, 1812, to be a citizen, without such recital of such certificate at full length, shall be of no validity or effect under the act of Congress. (c)

3. He must at the time of his application to be admitted, declare, on oath or affirmation, before some one of the Courts aforesaid, that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign Prince, Potentate, State, or Sovereignty whatever, and particularly by name, the Prince, Potentate, State, or Sovereignty, whereof he was before a citizen or subject; which proceedings must be recorded by the clerk of the Court. (d)

(b) Act of 14th April, 1802, sect. 2.

(c) Act of March 22d, 1816, sect. 1.

(d) Act of 14th April, 1802, sect. 1.

4. The Court admitting such alien must be satisfied, that he has resided within the United States five years at least, and within the State or Territory where such Court is at the time held, one year at least,^(e) and it must further appear to their satisfaction, that during that time, he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. But it is provided, that the oath of the applicant shall in no case be allowed to prove his residence.^(f)

5. In case he shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or State from which he came, he must in addition to the above requisites, make an express renunciation of his title or order of nobility, in the Court to

(e) In the act of March 3d, 1813, entitled, An Act for the Regulation of Seamen on board the Public and Private vessels of the United States. The 12th section is as follows:—

No person, who shall arrive in the United States from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not, for the continued term of five years next preceding his admission as aforesaid, have resided within the United States, *without being, at any time during the said five years, out of the Territory of the United States.*

By the first and other sections of the act, the regulations of the act as to employing seamen, were to take effect, from and after the termination of the war in which the United States were then engaged with Great Britain. By the 10th section, the provisions of this act shall have no effect or operation, *with respect to the employment as seamen*, of the subjects or citizens of any foreign nation, which shall not, by treaty or special convention with the government of the United States have prohibited, on board of her public and private vessels, the employment of native citizens of the United States, who have not become a citizen or subject of such nation.

The treaty of Ghent, which terminated the war with Great Britain, was ratified on the 17th February, 1815.

(f) Act of 14th April, 1802, sect. 1.

which his application is made, which renunciation must be recorded in the said Court.(g)

6. Every Court of record in any individual State having common law jurisdiction, and a seal, and clerk, or prothonotary, is considered as a Court within the meaning of this act, and every alien who may have been naturalized in any such Court, shall enjoy the same rights and privileges, as if he had been naturalized at a District or Circuit Court of the United States.(h)

It is provided however, that no person, heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the war, shall be admitted a citizen, as aforesaid, without the consent of the legislature of the State in which such person was proscribed.(i)

2. An alien who arrived between the 14th April, 1802, and the 18th June, 1812.

1. He must have made a declaration of intention three years before, as above mentioned.

2. He must declare on oath or affirmation, that he will support the Constitution of the United States, and renounce his allegiance to the foreign State as in the 2d, requisite next preceding.(k)

3. The Court admitting him must be satisfied, that he has resided within the United States for five years at least, and within the State or Territory, where the Court to which he applies is at the time held, one

(g) Act of 14th April, 1802, sect. 1.

(h) Ib. sect. 3.

(i) Ib. sect. 4.

(k) Ib.

year at least : and it must further appear to their satisfaction, that during that time he has behaved as a man of a good moral charcter, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same: provided, that the oath of the applicant shall in no case be allowed to prove his residence.^(l) The other circumstances are to be proved by common law evidence.^(m)

4. In case he shall have borne any hereditary title, or been of any of the orders of nobility, in the kingdom or State from which he came, he must, in addition to the above requisites make an express renunciation of his title or order of nobility, in the Court to which his application is made, which renunciation must be recorded in the said Court.⁽ⁿ⁾

5. He must have made a registry, and obtained a certificate, in the following manner, to wit : if of the age of twenty-one years, he must have made report of himself, if under the age of twenty-one years, or held in service, must have been reported by his parent, guardian, master, or mistress, to the clerk of the District Court,^(o) of the district where he arrived, or to some other Court of record of the United States, or of either of the Territorial districts of the same, or of a particular State, and such report must ascertain the name, birth place, age, nation, and allegiance, together with the country whence he or she migrated, and the place of his or her intended settlement: and it is made the duty of such clerk, on receiving such report, to record the same in his office, and to grant

(l) Act of 14th April, 1802.

(m) Anon. 1 Pet. 457.

(n) Act of 14th April, 1802.

(o) See supra.

to the person making such report, and to each individual concerned therein, a certificate under his hand and seal of office, of such report and registry: and for receiving and registering each report of an individual or family, he is to receive fifty cents, and for each certificate granted pursuant to the act to an individual or family, fifty cents: and such certificate is to be exhibited to the Court by every alien who may arrive in the United States after the passing of this act, on his application to be naturalized, as evidence of the time of his arrival within the United States.^(p) And this registry must have been made five years antecedent to the application; for it is the only evidence which the Court will receive of the time when such applicant arrived in the United States.^(q)

6. The same Courts have jurisdiction,^(r) and the proviso of the 4th section of the act of 14th April, 1802, applies.^(s)

3. An alien who, between the 18th June, 1798, and the 14th April, 1802, was residing within the limits and under the jurisdiction of the United States, and who has continued to reside therein.

1. No declaration of intention is necessary to have been previously made.^(t)

2. The oath or affirmation of support of the Constitution of the United States, and renunciation of allegiance must be taken.

(p) Act of 14th April, 1802, sect. 2.

(q) Anon. 1 Pet. 457.

(r) Act of 14th April, 1802, sect. 2.

(s) Ib. sect. 4.

(t) Acts of March 26th, 1804, sect. 1. March 22d, 1816, sect. 2.

3. It must be proved, to the satisfaction of the Court, that the applicant was residing within the limits and under the jurisdiction of the United States, before the 14th April, 1802, and has continued to reside within the same, or he shall not be admitted. And such residence, for at least five years immediately preceding the time of application, must be proved by the oath or affirmation of citizens of the United States, which citizens must be named in the record as witnesses. And such continued residence within the limits, and under the jurisdiction of the United States, when satisfactorily proved, and the place or places where he has resided for at least five years as aforesaid, must be stated and set forth, together with the names of such citizens in the record of the Court admitting him: otherwise the same shall not entitle him to be considered and deemed a citizen of the United States.(u) The Court must be satisfied, that he has resided within the State or Territory where such Court is, at the time held, one year at least.(x) And it must further appear to their satisfaction, that during that time he has behaved as a man of good moral character, &c, provided that the oath of the applicant shall in no case be allowed to prove his residence.(y)

4. He must renounce every title or order of nobility, &c.(z)

5. The same Courts have jurisdiction,(a) and the same proviso applies.

4. An alien who was residing within the limits and under the jurisdiction of the United States before the

(u) Act of March 22d, 1816, sect. 2.

(x) Act of 14th April, 1802, sect. 1.

(y) Ib.

(z) Ib.

(a) Ib.

29th January, 1795, may be admitted to become a citizen, on due proof made to some one of the Courts aforesaid, that he has resided two years at least within and under the jurisdiction of the United States, and one year at least immediately preceding his application, within the State or Territory where such Court is, at the time, held; and on his declaring, on oath or affirmation, his support of the Constitution, and renunciation of his allegiance &c, moreover, on its appearing, to the satisfaction of the Court, that during the said term of two years, he has behaved as a man of good moral character, &c, and upon his renouncing any title or order of nobility, &c. All of which proceeding must be recorded by the clerk thereof.^(b) The proviso of the 4th section of the act of 14th April, 1802, applies.^(c)

It seems, under the act of 14th April, 1802, admission as a citizen by a competent tribunal is conclusive. It need not appear, in the admission, that all the requisites prescribed by the act were complied with. It need not appear, therefore, that there was a declaration of intention, three years prior to the application, or one year's residence in the State.^(d) In a naturalization under the act of 29th January, 1795, it is sufficient, if the certificate of naturalization be given by a Court of competent jurisdiction, and state, that the oath prescribed by that act was administered, though it does not state, nor does it appear by the record, that the applicant was, by the judgment of the Court, admitted a citizen, or that the Court was satisfied, that he had, during the term of two years mentioned in the same, behaved as a man of good moral

^(b) Act of 14th April, 1802, sect. 1.—Proviso.

^(c) Sect. 4.

^(d) Stark v. The Chesapeake Insurance Company. 7 Cranch, 429.

character, &c.(e) But now, by the act of March 22d, 1816, as we have before seen, in all cases of persons arriving after the 18th June, 1812, the admission as a citizen is void, unless the certificate of report and registry, and the certificate of declaration of intention be recited at full length in the record of the Court admitting him.

Only free white persons can be admitted to become citizens of the United States: and an alien enemy can neither be admitted a citizen(f) nor make a declaration of intention.(g)

In relation to a widow and children, it is provided by the act of 14th April, 1802, sect. 4, that the children of persons duly naturalized under the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any of the said States, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States. Provided, that no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the late war, shall be admitted a citizen as aforesaid, without the consent of the legislature of the State in which such person was proscribed. By the 2d section of the act of 26th March, 1804, when any alien shall have complied with the first condition specified in the 1st section of the act of 14th April, 1802, (declared his intention,) and shall have pursued the directions prescribed in the 2d section of said act, (made report and registry,) and may die before he is naturalized, the

(e) *Campbell v. Gordon*. 6 Cranch, 176.

(f) Act of 14th April, 1802, sect. 1. See act of July 30, 1813.

(g) *Ex parte Newman*. 1 Gall. 11.

widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.

An infant female child who was resident abroad when the naturalization of her father took place, but came afterwards into the United States before the passage of the act of 14th April, 1802, and was dwelling in the United States at the time that act was passed, was held to be thereby naturalized; though it was doubtful how it would have been under the act of 29th January, 1795.^(h)

By the 4th section of the act of 14th April, 1802, the children of persons who then were, or had been citizens of the United States, should, though born out of the limits and jurisdiction of the United States be considered as citizens of the United States. *Provided*, that the right of citizenship should not descend to persons whose fathers have never resided within the United States.

Expatriation.

Congress has never passed any act regulating the manner and terms according to which the right of expatriation shall be exercised, although several Judges of the Supreme Court of the United States have expressed their opinions, that such a law is much wanted. In the few cases that have occurred in the Courts of the United States, in which this important point has been agitated, it seems admitted, that Congress has power to determine the mode in which expatriation may be exercised. But in regard to the law, at present it is not easy to deduce a general rule from the opinions expressed. In the year 1792, the State of Virginia passed an act on this subject. It was held,

^(h) Campbell v. Gordon. 6 Cranch, 176.

however, that this could affect the person complying with it, only as a citizen of that State, and not as a citizen of the United States ; and it seems questionable, how far such a law is compatible with the Constitution of the United States.(i) It was held, in the case of *Talbot v. Jansen*, that to render valid an expatriation by a citizen domiciled within the United States, there must be an entire departure by the party from the United States, and he must become the citizen of another country, with a view to relinquish his native country. Therefore, a citizen of the United States still remains such, notwithstanding his renunciation of allegiance to an individual State under the authority of a State law, or his becoming a citizen of a foreign State by taking an oath, without residence, and without a view to residence.(k) It seems also, that such departure must not be an illegal act : as, in the capacity of a cruizer against foreign powers at peace with us ; or in the act of treason, or any other crime or offence.(l) Nor ought it to be leaving duties unperformed at home. Thus, a person in the exercise of a public trust, ought not to leave the country, till he has accounted ; nor one who owes money, till he settles with his creditors. Under these restrictions, the right of expatriation exists, in time of war as well as of peace, until restrained by Congress.(m)

It is said, however, that a citizen of the United States, may become a citizen of another country, without *necessarily* relinquishing his own country : and it is no objection, that he thereby becomes a citizen of two governments at the same time. A man may, at

(i) *Talbot v. Jansen*. 3 Dall. 133, (1795.)

(k) *Ib.* PATERSON J. See the *Bello Corunnes*. 6 Wheat. 170.

(l) *Talbot v. Jansen*. 3 Dall. 133. IREDELL J. See the *Santissima Trinidad*. 7 Wheat. 548.

(m) *Talbot v. Jansen*. 3 Dall. 133. IREDELL J.

the same time, enjoy the rights of citizenship under two governments.⁽ⁿ⁾ His becoming a citizen or subject of another country, does not absolve him as a citizen or subject of his own country, but is subordinate to his original allegiance. Such latter citizenship, in such case, has only this effect, that whenever he goes into that country, and chooses to reside there, he is, *ipso facto*, to be deemed a citizen, without any thing farther.^(o) But this doctrine does not apply, where a citizen has fully expatriated himself, in the manner permitted by the laws of his own country.^(p)

In the case of Isaac Williams, who was tried in the Circuit Court of Connecticut, in September, 1799, before ELLSWORTH, C. J. and LAW, district Judge, for accepting a commission from the French Republic at Guadaloupe, and also for cruising against and capturing their enemies, who were at peace with us, it was held by the Chief Justice, that it was no defence that the defendant had left this country, of which he was before a citizen, in the year 1792, and was naturalized in various bureaus at Rochefort, in that year taking an oath of allegiance to the French Republic, and renouncing his allegiance to all other countries, especially to America, and was thereupon appointed, and continued to be a commissioned officer in the French marine, and was resident in the French Republic, making one visit of only six months to the United States in the year 1796, and was domiciled for three years then past in Guadaloupe, without any intention to return hither ; but he was convicted on two indictments for the above mentioned offences and fined and imprisoned : LAW District Judge *dubitante*.

⁽ⁿ⁾ Talbot v. Jansen. 3 Dall. 169. Per RUTLEDGE C. J. Per IREDELL J. See also the case of Isaac Williams, *post*.

^(o) *Ib.* 164. Per IREDELL J. who puts the case of the Marquis de La Fayette.

^(p) *Ib.*

The Chief Justice declared his opinion, that a member of the community cannot dissolve the social compact, so as to free himself from amesnability to our laws operating on citizens generally, without the consent or default of the community, and no consent either express or implied, existed under the policy or acts of the United States. It could not be inferred from our pacific station, or from our acts naturalizing foreigners. The embarrassment that may be occasioned to the individual, by becoming a member of two governments, is for himself to Judge of; and, therefore, the facts given in evidence were irrelevant, and ought not to go to the jury.(q)

In a case which occurred in the year 1804, the question whether a person born within the United States, or becoming a citizen according to its laws, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is left undecided. It is admitted, that an American citizen may acquire in a foreign country, the commercial privileges attached to his domicil, and would be exempted from the operation of a commercial act, embracing only "persons resident in the United States or under its protection." And although becoming a subject of a foreign power, may not rescue him from punishment for any crime committed against the United States, (a point not intended to be decided,) yet it places him out of the protection of the United States while within the territory of such foreign power, within the meaning of these words of the law.(r)

In August, 1812, during the late war with Great Britain, Elijah Clark was arrested, and charged as a spy before a general Court martial of the American

(q) *United States v. Williams*. 4 Hall's Law Journ. 461. 2 Cranch, 82, note. See also the opinion of WASHINGTON J. *United States v. Gillies*. 1 Pet. 161.

(r) *Murray v. The Charming Betsy*. 2 Cranch, 120.

army, held at Buffalo, in the State of New York. He had, about eighteen months before removed, with his wife, from the United States to Canada. Being convicted of the charge, he was sentenced by the Court martial to the punishment of death. But some doubt afterwards arising, whether he was embraced within the rules and articles of war, inasmuch as the 101st art. on this subject includes only persons not citizens of, or owing allegiance to the United States, a suspension of the sentence took place, and the case was referred to President MADISON. The President directed Clark to be discharged, unless he should be arraigned by the civil Court for treason, or for a minor crime under the laws of New York, the said Clark being considered a citizen of the United States.(s)

In the latest case in which the point occurred in the Supreme Court of the United States, the Court

(s) Case of Elijah Clark. Brackenridge's Law Miscellanies, 409. See the remarks, *Ib.* The sentiments of the government of the United States, in the year 1793, are thus expressed, in a letter from the Secretary of State, (Mr. Jefferson,) to Mr. Morris, dated 16th August, 1793. "Our citizens are certainly free to divest themselves of that character by emigration and other acts, manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do. But the laws do not admit, that the bare commission of a crime amounts, of itself, to a divestment of the character of citizen, and withdraws the criminal from their coercion." The government, therefore, resisted the claim of M. Genet, the ambassador from France, of Gideon Henfield as a French citizen, who being an American citizen, had engaged in the French naval service in Charleston, and cruized against their enemies, who were at peace with the United States. 1 Wait's State Papers, 143. 86.

In the year 1794, the Secretary of State, (Mr. Randolph,) thus expresses himself in relation to the alleged expatriation of Captain Talbot. "I cannot doubt that Captain Talbot has taken an oath to the French Republic; and at the same time I acknowledge my belief, that no law of any of the States prohibits expatriation. But it is obvious, that, to prevent frauds, some rules and ceremonies are necessary for its government. It then becomes a question, which is *also* an affair of the judiciary, whether those rules and

declared, that they gave no opinion whether an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country: but that it was perfectly clear that this cannot be done without a *bona fide* change of domicil, under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. But that it was unnecessary to go into a farther examination of this doctrine: it would be sufficient to ascertain its precise nature and limits, when it should become the leading point of a judgment of the Court.(t)

Constitution. Art. 1.—Bankruptcies.

Art. 1. s. 8. 4. Congress shall have power to establish uniform laws, on the subject of bankruptcies, throughout the United States.

This grant of power to Congress is not exclusive, either by the terms of the Constitution of the United States, or the nature of the power. Until the power is exercised, the States are not forbidden to pass bankrupt laws, except so far as they impair the obligation of contracts.(u) When, however, Congress enact a general bankrupt law, the right of the States is suspended, though not extinguished: for, on the repeal of the bankrupt law, the ability of the States to exer-

ceremonies have been complied with." Letter to M. Fauchet, minister of the French Republic, Oct. 28th, 1797. 2 Wait's State Papers, 251.

(t) *The Santissima Trinidad*. 7 Wheat. 342. See *Stoughton v. Taylor*. Opinion of VAN NESS D. J. Nat. Intell. Dec. 3d and 5th, 1818. *Duponceau's Bynkershoek*, 175. 3 Hall's Law Journ. *Murray v. M'Carty*. 2 Munf. 393. *Hay's Treat. on Expatriation*. Washington, 1814. *Tucker's Black*. Vol. I. Part 1, 426. *Bee's Adm. Rep.* 11.

(u) See *post*. art. 1. s. 10. 1.

ternal improvements in the States, with their assent, by means of roads and canals, has been claimed as being incidental to this, and other powers granted by the Constitution, namely : the right to declare war, to regulate commerce, to pay the debts, and provide for the common defence, and general welfare, the power to make all laws necessary and proper for carrying into execution all the powers vested, by the Constitution, in the government of the United States, or in any department or officer thereof ; and lastly, from the power to dispose of and make all needful rules and regulations respecting the Territory and other property of the United States.(e) Its exercise is also vindicated by precedent. It has been the constant practice to allow to the new States, five per cent. of the nett proceeds arising from the sale of public lands, to be laid out in the construction of roads and canals. Of this five per cent., three-fifths were to be expended within the States, and two-fifths, under the direction of Congress, in the making of roads leading to these States. From forty to fifty thousand dollars are annually expended in this manner. Moreover, in 1806, the President was authorised by Congress to open a road from Nashville, in the State of Tennessee, to Natchez : this road passed through a State without asking consent. In the year 1809, the President was authorised to cause the canal of Carondelet, leading from Lake Ponchartraine to the city of New-Orleans, to be extended to the river Mississippi.(f) The Cumberland road, which has been constructed under an act passed March 29th, 1806, has cost nearly 1,800,000 dollars, which exceeds the proceeds arising from the sales of public lands in the State of

(e) Message of President Monroe, May 4th, 1822.

(f) But it seems this was through a country that was Territorial.

Ohio, more than 1,000,000 dollars.(g) This road was made under a covenant with the State of Ohio by act of April 30th, 1802, that a portion of the avails of the sales of land lying within that State, should be applied to the opening of roads leading to that State, with the consent of the several States through which the road was to pass, and Virginia, Pennsylvania, and Maryland, through which it passes, gave their consent. Other acts confirming, amending, and enlarging this act, were passed in 1810, 1815, and 1816.

In the year 1817, however, after a bill had been passed by Congress setting apart the *bonus* to be paid by the bank of the United States for its charter, for constructing roads, and canals, and improving the navigation of water courses, it was returned by President MADISON, who assigned as a reason, that the power of Congress, under the Constitution, did not extend to making roads and canals, and improving water courses, through the different States, nor could the assent of those States confer the power: and that it could be constitutionally vested only by an amendment of the Constitution ;(h) and the bill, on its return, was negatived in the House of Representatives.

Afterwards on the 15th December, in the same year, a committee of the House of Representatives reported in favour of the power of Congress,

1. To lay out, construct, and improve post roads through the several States, with the assent of the respective States.

2. To open, construct, and improve military roads through the several States, with the assent of the respective States.

(g) Report of Committee of House of Representatives, April 26th, 1822.

(h) Message, March 3d, 1817, 12th Niles's Reg. 25.

3. To cut canals through the several States, with their assent, for promoting, and giving security to internal commerce, and for the more safe and economical transportation of military stores, &c. in time of war, leaving, in all these cases, the jurisdictional right over the soil in the respective States. And they recommended a resolution, that it was expedient to constitute the sum to be paid by the bank of the United States, and the dividends, as a fund for internal improvements.⁽ⁱ⁾

In the year, 1822, a bill was passed by Congress, for the preservation and repair of the Cumberland road, appropriating money and establishing gates, and tolls on the road, and enforcing the collection of tolls by penalties. But the bill was returned by President MONROE as unconstitutional, with his reasons for that opinion, and was finally lost.^(k)

Various acts seem to have been passed, from time to time, by Congress, for constructing roads in the Territories, under the 4th article of the Constitution, sect. 3. 2.

Under the acts passed by Congress, for the establishment of the post office, it is no justification to a person indicted under the 7th section of the act of 30th April, 1799, for wilfully obstructing the passage of the public mail, that he had fed the horses employed in carrying the mail, and that a sum of money was

(i) 13 Niles's W. Reg. 287.

(k) Message of President MONROE to Congress, May 4th, 1822. President MONROE communicated to Congress, at the same Session, an extensive discussion of this interesting question. See Niles's W. Reg. August, 1822.

It appears from the Message of President JEFFERSON to Congress, of December 2d, 1806, that it was his opinion, that these objects are not within the Constitutional powers of Congress, and that an amendment to the Constitution is necessary, to authorise the expenditure of the public money for such purposes. 5 Wait's State Papers, 458, 459. See also Message of President MADISON, Dec. 3, 1816, to the same point.

due to him for food furnished at, and before, their arrest and detention. No lien exists against the government in such case; nor can the government be sued: the only remedy is by application to Congress, if the government refuse payment. A stolen horse, found carrying the mail stage, cannot be seized by the owner, so as to retard the mail. A driver being in debt, or even committing an offence, can only be arrested in such way, as does not obstruct the passage of the mail.^(l) But it has been held by the Circuit Court in a subsequent case, that the act of Congress ought not to be so construed, as to shield the carrier of the mail against a temporary stoppage of the mail, by a municipal officer, where it is driving through a populous city at such a rate as to endanger the safety of the inhabitants, contrary to an ordinance of the city. And that if the officer had a warrant against a felon, who had placed himself in the stage, or the driver should commit murder in the street, in the presence of the officer, and then place himself on the box, they would not be protected against arrest, because a temporary stoppage of the mail would be the consequence.^(m)

Constitution. Art. 1.—Patents.

Art. 1. sect. 8. 8. Congress shall have power to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries.

It has been held by the New York Court of Errors, that this power is concurrent with the power of the States, provided the exercise of the power by the latter does not contravene the acts of Congress on the subject. The State may, therefore, grant to an author

(l) United States v. Barney. 3 Hall's Law Journ. 128, by WINCHESTER J.

(m) United States v. Hart. 1 Pct. 390.

or inventor, an exclusive right, the operation of which would be confined to the limits of such State, where no patent right from the United States is granted. Where Congress go no further than to secure the right to the author or inventor, the State may regulate the use of such right, or restrain it so far as it is injurious to the public. It is subject, like other property, to taxation or debts. But, at any rate, as the acts of Congress extend only to the *inventor* of a useful art, a State may grant an exclusive right to the *possessor* of that art, who does not claim as an inventor, or to one who introduces it from abroad. It was, therefore, determined, that acts of assembly, passed at different periods by the legislature of New York, since the adoption of the Constitution of the United States, granting to the plaintiffs, as *possessors* of the art, for limited periods, the exclusive privilege of navigating the waters of New York with steam boats, and imposing a penalty on other persons navigating in the same manner, in such waters, without license from the grantees, were not contrary to the Constitution and laws of the United States, but were valid, and an injunction was issued by the Court, to restrain the defendant from the use of them.(n)

Constitution. Art. 1.—War.

Art. 1. s. 8. 10. Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

A mere declaration of war by an act of Congress, does not, of itself, vest a right to seize and condemn tangible property, of the individuals of the nation against whom war is declared, found within the territory of the United States, at the time of such declara-

(n) *Livingston v. Van Ingen.* 9 Johns. 507. See 1 Tucker's Black. 183. See *post.* Commerce.

tion. Such property cannot be seized and condemned, without some further legislative provision authorising it. The right to seize and condemn property of the belligerent, whether tangible, or consisting of debts, exists by the law of nations; but it is a right to be exercised or waved at the will of the sovereign authority, and without the expression of the will of Congress, further than by a mere declaration of war, the judiciary cannot enforce it. The right to debts due between belligerents at the breaking out of war, revives at the restoration of peace, unless confiscation is enforced by a particular provision of the legislative power. An act of Congress, therefore, declaring war, and authorising the President to issue letters of marque and general reprisal, against the vessels, goods, and effects of the enemy, does not authorise a seizure by an individual, not commissioned, of property of an enemy, found in the care and custody of one of our citizens on land, or floating in a creek within the territory of the United States, at the declaration of war, nor does it authorise such seizure by order of the executive.(o)

Constitution. Art. 1.—Army and Navy.

Art. 1. s. 8. 11 and 12. Congress shall have power to raise and support armies, to provide and maintain a navy.

Congress have power, under the Constitution, to authorise the enlistment of minors for the army and navy of the United States, without the consent of their parents.(p)

Constitution. Art. 1.—Militia.

Art. 1. sect. 8. 14. Congress shall have power, to

(o) *Brown v. The United States.* 8 Cranch, 110.

(p) *United States v. Bainbridge.* Mason, 71. Per STORY J. DAVIS D. J. diss.

provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.

15. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress.

Under these clauses of the Constitution, the following points have been decided.

1. If Congress had chosen, they might, by law, have considered a militia man, called into the service of the United States, as being, from the time of such call, constructively in that service, though not *actually* so, although he should not appear at the place of rendezvous. But they have not so considered him, in the acts of Congress, till after his appearance at the place of rendezvous: previous to that, a fine was to be paid for the delinquency in not obeying the call, which fine was deemed an equivalent for his services, and an atonement for his disobedience.

2. The militia belong to the States respectively, and are subject, both in their civil and military capacities, to the jurisdiction and laws of the State, except so far as these laws are controlled by acts of Congress, constitutionally made.

3. It is presumable the framers of the Constitution contemplated a full exercise of all the powers of organising, arming, and disciplining the militia: nevertheless, if Congress had declined to exercise them, it was competent to the State governments respectively

to do it. But Congress has executed these powers as fully as was thought right, and covered the whole ground of their legislation by different laws, notwithstanding important provisions may have been omitted, or those enacted might be beneficially altered or enlarged.

4. After this, the States cannot enact or enforce laws on the same subject. For, although their laws may not be directly repugnant to those of Congress, yet Congress having exercised their will upon the subject, the States cannot legislate upon it. If the law of the latter be the same, it is inoperative: if they differ, they must, in the nature of things, oppose each other, so far as they differ.

5. Thus if an act of Congress imposes a fine, and a State law fine and imprisonment for the same offence, though the latter is not repugnant, inasmuch as it agrees with the act of Congress, so far as the latter goes, and add another punishment, yet the wills of the two legislating powers in relation to the subject are different, and cannot consist harmoniously together.

6. The same legislating power may impose cumulative punishments: but not different legislating powers.

7. Therefore, where the State governments have, by the Constitution, a concurrent power with the national government, the former cannot legislate on any subject on which Congress has acted, although the two laws are not in terms contradictory and repugnant to each other.

8. Where Congress prescribed the punishment to be inflicted on a militia man, detached and called forth, but refusing to march, and also provided that

Courts martial for the trial of such delinquents to be composed of militia officers only, should be held and conducted in the manner pointed out by the rules and articles of war, and a State had passed a law enacting the penalties on such delinquents which the act of Congress prescribed, and directing lists of the delinquents to be furnished to the Comptroller of the United States and marshal, that further proceedings might take place according to the act of Congress, and providing for their trial by State Courts martial, such State Courts martial have jurisdiction. Congress might have vested exclusive jurisdiction in Courts martial to be held according to their laws, but not having done so expressly, their jurisdiction is not exclusive.

9. Although Congress have exercised the whole power of calling out the militia, yet they are not national militia, till employed in actual service, and they are not employed in actual service, till they arrive at the place of rendezvous.(q)

But, it seems, a State court martial sitting without the authority of an act of assembly of the State, passed for that purpose, would not have jurisdiction.(r)

Constitution. Art. 1.—Piracy.

Art. 1. s. 8. 9. Congress shall have power to define. and punish piracies, and felonies committed on the high seas, and offences against the law of nations.

This power *to define and punish*, seems rather applicable to felonies and offences against the law of nations, than to piracies; for as to those, the power *to punish* would be sufficient. Piracy is well defined by

(q) *Houston v. Moore*. 5 Wheat. 1. See, however, the opinions of JOHNSON J. and STORY J.

(r) *Mead's Case*. 5 Hall's Law Journ. 536, and *Bolton's Case*. 3 Serg. & Rawle, 176, *note*.

the law of nations as robbery on the sea. The term, felonies, however, in relation to offences on the high seas, is necessarily somewhat indeterminate, since the term is not used in the criminal jurisdiction of the admiralty, in the technical sense of the common law. Offences against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code, recognised by the common consent of nations. In respect to these, there is a peculiar fitness in giving the power to define, as well as to punish.(s)

The Constitution having conferred on Congress the power of punishing piracy, there can be no doubt of the right of Congress to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States.(t)

The first act of Congress on the subject of piracy, was the act of 30th April, 1790, which provides, in the 8th section, that if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State, murder or robbery, or any other offence, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death, or if any captain or mariner of any ship or other vessel shall, piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate: every such offender shall be deemed taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the of-

(s) *United States v. Smith.* 5 Wheat. 159.

(t) *United States v. Palmer.* 3 Wheat. 630.

fender is apprehended, or into which he may first be brought.

A vessel within a marine league of shore, at anchor in an open roadstead, where vessels only ride under the shelter of land, at a season when the course of winds is invariable, is upon the *high seas*.^(u) So, it is held, that high seas, mean any waters on the sea coast, which are without the boundaries of low water mark, although such waters may be in a roadstead or bay, within the jurisdictional limits of a foreign government.^(x) Those limits, though neutral to war, are not neutral to crimes.^(y) In the construction of the words "upon the high seas," it has been held, that it makes no difference whether the offence of piratical murder was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard.^(z) Piratical murder committed from on board an American vessel by a mariner sailing on board an American vessel, by a foreigner on a foreigner, in a foreign vessel, is within this act.^(a) And the same offence committed by any person *from on board* a vessel having no national character, and drowning him is within the same law.^(b)

The words, "out of the jurisdiction of any particular State," in this section, mean, out of the jurisdiction of any particular State of the United States. So that land piracies, and piracies committed within our waters, are not within it.^(c)

(u) *United States v. Griffin and Brailsford*. 5 Wheat. 204, 206.

(x) *United States v. Ross*. 1 Gall. 624. See also *United States v. Smith*. Mason, 147.

(y) *United States v. Griffin and Brailsford*. 5 Wheat. 200, 201. See *post*.

(z) *United States v. Holmes*. 5 Wheat. 418.

(a) *United States v. Furlong*. 5 Wheat. 203.

(b) *United States v. Holmes*. 5 Wheat. 418.

(c) *United States v. Ross*. 1 Gall. 624. See *post*. as to murder, and *United States v. Bevans*. 3 Wheat.

The words, "which, if committed within the body of a county, would, by the laws of the United States, be punishable with death," relate to any other offence, should there be any, of the description mentioned, and not to robbery or murder. Although, therefore, a robbery committed on land is not, by the laws of the United States, punishable with death, yet a robbery on the high seas is piracy within this section.(d)

The word, robbery, used in this section is to be understood in the sense in which it is recognised and defined at common law.(e) If an act of Congress use a technical term which is known, and its meaningfully ascertained by the common or civil law, from one or the other of which it is obviously borrowed, it is necessary to refer to the source from which it is taken, for its precise meaning.(f) Therefore, the felonious taking of goods from the person of another, or in his presence, on the high seas, by violence or by putting him in fear, and against his will, is felony and piracy, by the act of 1790.(g)

Though the words, "any person or persons," are broad enough to comprehend every human being, yet it was held, that the crime of robbery committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign State, on persons within a vessel belonging exclusively to subjects of a foreign State, is not piracy within the true intent and meaning of this act.(h) This opinion, however, was afterwards reconsidered, and it was then determined, that it applied exclusively to a robbery or murder committed by a person on board

(d) *United States v. Palmer*. 3 Wheat. 610. *United States v. Jones*, (1813.)

(e) *United States v. Palmer*. 3 Wheat. 630.

(f) *United States v. Jones*, (1813.) Pamph. 57.

(g) *Ib.* 59.

(h) *United States v. Palmer*. 3 Wheat. 633, 634. See 5 Wheat. App. Speech of C. J. MARSHALL.

of any ship or vessel belonging to subjects of a foreign State; that is, she must be the property of subjects of a foreign State, under their controul, and sailing under the flag of a foreign State whose authority is acknowledged. For, general piracy, murder, or robbery, committed in the places described in this section, by persons on board of a vessel, not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the Courts of the United States.⁽ⁱ⁾

In questions, therefore, of murder, or robbery, under this act, it makes no difference, whether the offender be a citizen of the United States or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered, *pro hoc vice*, and in respect to this subject, as belonging to the nation under whose flag he sails. If it be committed by a citizen or foreigner, on board of a piratical vessel, the offence is equally cognisable by the Courts of the United States under this law.^(k)

It seems, a commission given by one as brigadier of a republic, of whose existence the Court knows nothing, or as independent generalissimo of a province in the possession of the mother country, is, so far as the Court can take cognisance of it, void. But, whether a person acting under such commission with good faith can be guilty of piracy, *query*. If, however, the whole transaction of the capture made under such commission, demonstrates that it was not made *jure belli*, but the vessel was seized on the high seas, and carried into a port of the United States, *animo*

(i) United States v. Klintock. 5 Wheat. 151, 152. United States v. Holmes. 5 Wheat. 417.

(k) United States v. Holmes. 5 Wheat. 417.

furandi, it is not a belligerent capture, but a robbery on the high seas. Fraud in effecting a capture will not, of itself, constitute piracy; yet it may be an ingredient in the transaction, not inconsistent with that character.^(l) A belligerent character may be put off, and a piratical one assumed, even under the most unquestionable commission.^(m)

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the Courts of the Union must view such newly constituted government, as it is viewed by the legislative and executive departments of the government of the United States. If the government of the Union remains neutral, but recognises the existence of a civil war, the Courts of the Union cannot consider as criminal, those acts of hostility which war authorises, and which the new government may direct against the enemy.⁽ⁿ⁾ Each party in the war is to be deemed, by us, a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights.^(o) It follows, that persons or vessels, employed by such government, may prove the fact of their being employed in such service, by the same testimony, which would be sufficient to prove they were employed by an acknowledged State. Such fact may be proved, without proving the seal of the new government. The seal cannot prove itself, but may be proved by such evidence as the nature of the case admits.^(p) In general, the commission of a public ship, signed by the proper au-

^(l) *United States v. Klintock*. 5 Wheat. 151. *United States v. Holmes*. 5 Wheat. 416.

^(m) *United States v. Pirates*. 5 Wheat. 202.

⁽ⁿ⁾ *United States v. Palmer*. 3 Wheat. 643.

^(o) *The Santissima Trinidad*. 7 Wheat. 337.

^(p) *Ib.*

thorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced: nor will the Courts of a foreign country inquire into the means, by which the title to the property has been acquired.^(q) But, where it does not appear by any legal proof, that a privateer had a commission, or any ship's papers, or documents, from such government, or that they were ever recognised as ships of that nation, or of its subjects, or who were the owners, or where they resided, or when, or where the privateer was armed or equipped, but the captain and crew were of different nations, the captain was domiciled at Baltimore, was by birth an American, and the privateer was Baltimore built, the burthen of proof of the national character of the vessel, on board of which the offence was committed, lies on the defendants who stand charged with piracy.^(r)

The national character of an American vessel plundered, or run away with, may be proved without production of her register, or proof of its having been on board of her. Property or character is a matter *in pais*, and is to be so established.^(s) So, it has been held, on an indictment for piracy, committed on board of a neutral vessel, by an American privateer, where it did not appear that there was any registry or bill of sale of the vessel, but there were invoices and bills of lading, that other evidence of the ownership might be given. These papers might be necessary in case there was ground to suspect that they were kept out of sight for fraudulent purposes. But if nothing of this sort be pretended, the captain may

(q) United States v. Holmes. 5 Wheat. 418.

(r) The Santissima Trinidad. 7 Wheat. 335. See the case of the Exchange. 7 Cranch, 116.

(s) United States v. Pirates. 5 Wheat. 199, 205, 206.

testify as to the vessel and cargo being *bona fide* neutral property.(t)

In a case that occurred during the late war with Great Britain, the defendant, who was first lieutenant of the schooner *Revenge*, a regularly commissioned American privateer, was indicted in the Circuit Court of the district of Pennsylvania, for piracy, by a robbery committed upon the property of a neutral met with on board a neutral vessel on the high seas, and it was held, that if a commissioned cruiser take the property of a neutral, he is a trespasser, and will be compelled, not only to make restitution, but compensation also, in damages, unless he had probable cause for seizing the property as prize. But if he should make the seizure, not as prize, but with a felonious intent to convert the property to his own use, without inquiry or trial, his commission would not shield him from the charge of felony and piracy. In deciding, in either case, whether the act amounts to felony or trespass, the *quo animo* is to be sought after, and is to be judged of by the actions of the party.(u) The 8th and 9th articles of the rules for the government of the navy, (act of Congress of 23d April, 1800,) inflicting punishment by Court martial on those who shall take from a vessel at sea any part of her cargo, or embezzle the same, or who shall maltreat any of the persons, relate expressly to *prizes*, or to the vessels seized as *prizes*, and not to acts of piracy. And the act of 26th June, 1812, respecting privateers, is confined to the conduct of persons on board of privateers, and is intended for their government. But for piratical acts committed on others, no punishment or mode of trial by Court martial is prescribed.(x)

(t) *United States v. Jones*. Pamph. Philadelphia, (1813,) 11. Before WASHINGTON J. and PETERS D. J. See *post*.

(u) *United States v. Jones*. Pamph. Philadelphia, 1813. 59.

(x) *Ib.* 57. In this case, the Portuguese vessel was detained for some hours, and then permitted to proceed. Money, clothing, and

It seems, that though a treaty made by the United States with a foreign power, stipulate, that if any citizen of the United States take a commission, or letter of marque, for arming any ship or vessel, to act as a privateer against the subjects of such foreign power, or their property, from any prince or State at war with such power, he shall be punished as a pirate, yet, it is questionable, whether such citizen is punishable as a pirate under the present laws of the United States, for such act or for aggressions under it: but he might have been punishable under the act of 14th June, 1797, for a high misdemeanor, in so arming, commanding, &c. such vessel, out of the jurisdiction of the United States; and he cannot in a Court of the United States, demand restitution of a prize taken under such authority, of which he has been dispossessed by his associates.(y)

much other valuable property were taken on board the privateer, which was under English colours, and no attempt was made to send them in for adjudication, but part was divided among the crew, and the rest concealed. After arrival in the United States, they observed a profound silence respecting the property. Force, and intimidation were used in obtaining the property. These and other circumstances, the Court considered sufficient to establish a felonious intent. The prisoner, however, was acquitted, as it appeared by the evidence, that the acts charged were committed by others, and that he was not concerned in them.

(y) *The Bello Corunnes*. 6 Wheat. 171.

The 9th section of the act of June 5th, 1794, and the 2d section of the act of 14th June, 1797, provided, that nothing in those acts should be construed to prevent the prosecution or punishment of treason, *or any piracy defined by a treaty, or other law of the United States*. These acts are repealed by the act of 20th April, 1818, and, in part supplied by it: but this proviso is omitted.

Many of the treaties made by the United States with foreign powers, contained a stipulation similar to that of the treaty with Spain, referred to in the above case. Such stipulation was contained in the treaty of 1778, with France, art. 21; the treaty of 1782, with the United Netherlands, art. 19.; the treaty of 1783, with the king of Sweden, art. 23.; the treaties of 1785, (art. 20,) and of 1799, (art. 20,) with Prussia. In the treaty of 1794, (art. 21,) with Great Britain, the language is varied.

The piratically and feloniously running away with a ship, within the foregoing section, is the running away with a ship, with the wrongful and fraudulent intent to convert the same to the taker's own use, and make the same his own property, against the will of the owner. The intent must be that *animus furandi* which the law deems felonious. It is not necessary, that any force, or violence, or putting in fear should have been used, to constitute this offence.(z)

The 9th section of the act of 30th April, 1790, enacts, that if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign Prince or State, or on pretence of any authority, from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed adjudged and taken to be a pirate, felon, and robber, and, on being thereof convicted shall suffer death.

This section appears to have been passed for the purpose of declaring those acts piracy in a citizen, when committed on a citizen, which would be only belligerent acts when committed on others. And, it seems, that a citizen, taking a commission under a foreign power, must still be deemed a citizen under this law, and his acts, committed under such commission, may be adjudged piratical acts, under this section.(a) A citizen who offends against the United States, or its citizens, under colour of a foreign commission, is punishable in the same manner as if he had no commission.(b)

Query, whether this section embraces offences committed in a river, harbour, basin, or bay, which are

(z) United States v. Tully and Dalton. 1 Gall. 247.

(a) United States v. Pirates. 5 Wheat. 201, 202. United States v. Jones. Pamph. 60.

(b) United States v. Wiltberger. 5 Wheat. 100. 97.

waters of a foreign State, or of the United States out of the jurisdiction of a particular State.^(c)

By sect. 10, of the act of 30th April, 1790, every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel or advise, any person or persons to do or commit any murder or robbery, or other piracy aforesaid upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person, so as aforesaid aiding assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed and adjudged to be, accessory to such piracies before the fact, and every such person, being thereof convicted, shall suffer death.

It seems, this section does not extend to punish in our Courts, the subject of a foreign prince, who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery.^(d)

The defects in the act of 30th April, 1790, and the questions that had arisen concerning its construction, gave occasion to the act of March 3d, 1819, which provided, in the 5th section, that if any person or persons whatsoever shall, on the high seas, commit the crime of piracy as defined by the laws of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death. This act

^(c) United States v. Wiltberger. 5 Wheat. 99, 100.

^(d) United States v. Palmer. 3 Wheat. 633. See the Speech of C. J. MARSHALL. 5 Wheat. App.

was, by sect. 6, to be in force until the end of the next session of Congress.

Under this act it was contended, that in punishing piracy, "as defined by the law of nations," Congress did not sufficiently exercise their constitutional power; that they were bound to define the offence in terms, and ought not to have referred, for its definition, to the law of nations, leaving that law to be ascertained by judicial decisions. But, it was held, that Congress had the power to *punish* piracies, as well as to *define* them; that they might define them by reference, as well as in terms: that by the law of nations, piracy is robbery on the sea, and that it was sufficiently and constitutionally defined by this section.^(e) It was also held, that the 8th section of the act of 30th April, 1790, was not virtually repealed by the passage of this act.^(f)

At the ensuing session of Congress, however, the 5th section of the act of 1819, was suffered to expire, except as to crimes theretofore committed, and another act was passed, namely, the act of 15th May, 1820. The 33d section of which provides, that if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate; and, being thereof convicted before the Circuit Court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruize or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall

^(e) United States v. Smith. 5 Wheat. 158. LIVINGSTON J. diss. United States v. Griffin. 5 Wheat. 204.

^(f) United States v. Smith. 5 Wheat. 163.

land from such ship or vessel, and on shore shall commit robbery, (g) such person shall be adjudged a pirate, and on conviction thereof before the Circuit Court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. *Provided*, that nothing in this section contained shall be construed to deprive any particular State of its jurisdiction over such offences, when committed within the body of a county, or authorise the Courts of the United States to try such offenders, after conviction or acquittance for the same offence in a State Court.

In relation to murder, under the 8th section of the act of 30th April, 1790, it has been held, that if the mortal stroke be given in a harbour of a foreign country, and the party stricken languish with the wound, and die on shore of the wound, it is not murder within this act. The death, as well as the mortal stroke, must happen on the high seas, to constitute it murder there. Congress, however, under the power to define and punish felonies on the high seas, may provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged felony. (h)

Under the words, "out of the jurisdiction of any particular State," it has been determined, that murder committed in a harbour, within the territory of a State, is not within the 8th section of the act of 30th April, 1790, though committed on board a ship of the line of the United States, by one of the crew upon another. If the Constitution, in extending the judicial power to all cases of admiralty and maritime jurisdiction, has granted to Congress exclusive power to legislate, yet if they have not legislated, the Courts of the

(g) See Du Ponceau's *Bynkershoek*, 127. (3 Hall's Law Journal.)

(h) *United States v. McGill*. 4 Dall. 426. See *ante*, as to "high seas."

United States cannot take cognisance of the case. Whether Courts of common law have concurrent jurisdiction with Courts of admiralty, over murders committed in bays which are inclosed parts of the sea, and whether, therefore, the offence is within the jurisdiction of the State, in whose bay it takes place, is not decided: but if such be the case, Congress cannot, it seems, under this clause of the Constitution, divest the State Courts of jurisdiction in such case, though it might vest a concurrent one in its own Courts.(i)

By the 3d section of the act of 30th April, 1790, if any person shall, within any fort, arsenal, magazine, or in any other place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death.

By the words, "other places," is meant another place of a similar character with those previously enumerated, and with that which follows. It means an object fixed and territorial. It does not, therefore, embrace an offence committed on board of a ship of the line, nor does any subsequent act, which gives the ordinary Courts of the United States jurisdiction in these cases.(k)

Revolt, &c. on the high seas.

By the 8th section of the act of 30th April, 1790, if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship, every such offender shall be deemed, taken, and adjudged to be a pirate

(i) *United States v. Bevens*. 3 Wheat. 356. See *ante*. Murder, by an officer, seaman, or marine, committed without the territorial jurisdiction of the United States, is punishable with death by the sentence of a court martial. Rules, &c. of the Navy. Act of April 23d, 1800, art. 21.

(k) *United States v. Bevens*. 3 Wheat. 390.

and felon, and being thereof convicted, shall suffer death. And by sect. 12, if any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavour to corrupt any commander, master, officer, or mariner, to yield up, or to run away with, any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to, or confederate with pirates, or in any wise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind, or shall fit out any vessel knowingly, and with a design to trade with or supply, or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavour to make a revolt in such ship or vessel, such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

An endeavour to make a revolt in a ship, is defined in one case, to be, an endeavour to excite the crew to overthrow the lawful authority and command of the master and officers of the ship. It is, in effect, an endeavour to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers of the ship. A mere act of disobedience to a lawful command of the officers, is not of itself, an endeavour to make a revolt; but to amount to the offence, it must be combined with an attempt to excite others of the crew to a general resistance or disobedience of orders, or of a single lawful order of the master, or a general neglect and refusal of duty in a single case. So, if there be an endeavour to usurp the command and government of the ship, by com-

bining the crew in hostility to the master and officers. And a vessel lying on the sea, outside of the bar of a harbour of the United States, within three miles of land, is on the high seas.^(l)

But in a subsequent case, though WASHINGTON J. intimated his opinion, that to make a revolt was, to throw off all obedience to the master, to take possession by force of the vessel, by the crew, to navigate her themselves, or transfer the command to some other person on board, and that the clause in this section relating to revolt applied to merchant vessels, in time of peace as well as in time of war, whereas the other clause, next preceding, was confined to hostile resistance in time of war, yet, as he could find no authority in the common, admiralty, or civil law, to support this opinion, and the definitions given by philologists were multifarious and different, the case being of a capital nature, the Court would not recommend to the jury to find the prisoners guilty of making or endeavouring to make a revolt, however strong the evidence might be.^(m)

Under the 12th section, any confinement of the master, whether by depriving him of the use of his limbs, or by shutting him up in the cabin, or, by intimidation, preventing him from the free use of every part of the vessel, amounts to a confinement in contemplation of law.⁽ⁿ⁾ The law makes no distinction as to the duration of the confinement. Therefore, where the defendant unlawfully seized the captain, and restrained him a minute or two, and would have thrown him overboard unless he had been rescued, it was held to amount to actual confinement within this law. There

^(l) United States v. Smith. Mason, 147. As to high seas, see *ante*, Piracy.

^(m) United States v. Sharp. 1 Pet. 118. See also United States v. Bladen. 1 Pet. 213.

⁽ⁿ⁾ *Ib.*

is, also, a constructive confinement, which is where the captain is restrained from performing the duties of his station, by such mutinous conduct of his crew as might reasonably intimidate a firm man; and it makes no difference, in this respect, that the master did, in fact, go unmolested to every part of the vessel, whenever he pleased, if he was compelled by a regard to his own safety to go armed, and if, in the opinion of the jury, under all the circumstances, it was necessary or prudent so to do.(o)

The seamen, mentioned in this section, includes, as well a seaman received on board at a foreign port, upon the application of the American consul, under the 4th section of the act of 28th February, 1803, as one engaged by the master, and signing the shipping articles.(p)

Manslaughter is not punishable under the 12th section, unless committed on the high seas. The words, high seas, if not, in every instance, confined to the ocean which washes a coast, never extends to a river about half a mile wide, and in the interior of a country: nor can the description of place in the 8th section, be carried into this section. It was, therefore, held, that a manslaughter, committed by a master of a merchant vessel upon one of the seamen, on board such vessel, in the river Tigris, in the Empire of China, 35 miles above its mouth, about 100 yards from the shore, in $4\frac{1}{2}$ fathoms water, and below low water mark, was not punishable by the laws of the United States.(q)

In addition to the offences made piracy by the acts of Congress before mentioned, the 4th and 5th sections of the act of 20th April. 1818. declare certain other offences relative to the slave trade, to be piracy, and punishable with death.

(o) United States v. Bladen. 1 Pet. 213.

(p) United States v. Sharp. 1 Pet. 118.

(q) United States v. Wiltberger. 5 Wheat. 76.

Constitution. Art. 1.—District of Columbia, forts, &c.

Art. 1. s. 8. 16. Congress shall have power to exercise exclusive legislation, in all cases whatsoever, over such district, (not exceeding ten miles square,) as may, by cession of particular States, and acceptance of Congress, become the seat of Government of the United States; and to exercise like authority, over all places purchased by the consent of the Legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

The power of exercising exclusive legislation over such district as should become the seat of government, like all others which are specified, is conferred on Congress as the Legislature of the Union, and cannot be exercised in any other character. A law passed in pursuance of it, is the supreme law of the land, under the 2d clause of the 6th article of the Constitution; is binding as such on the States; and a law of a State to defeat it would be void. The power to pass such a law carries with it all those incidental powers, which are necessary to its complete and effectual execution: and such law may, it seems, be extended in its operation throughout the United States, if Congress think it necessary to do so.^(r) But, if it be intended to give it a binding efficacy beyond the district, there ought to be language used shewing this intention; especially, if it is to extend into the particular States, and to limit and control their penal laws. If it be not essential to such law to give it such construction, and there is no evidence of an intention to do so, in the words or object of the law, it will be considered as local, and as not operating beyond the local limits.^(s)

^(r) *Cohens v. Virginia.* 6 Wheat. 264. See *United States v. More.* 3 Cranch, 159.

^(s) *Ib.*

So also, the power vested in Congress, to legislate exclusively within any place ceded by a State, carries with it, as an incident, the right to make that power effectual. They may, therefore, provide by law, for apprehending a person who escapes from a fort, &c., after committing a felony; for conveying him to or from any other place for trial, or execution; or for conveying his body, after execution, and punishing one who rescues it. So, they may punish those for misprison of felony, who, out of a fort, conceal a felony committed within it. (t)

Though the District of Columbia has no representative in Congress, yet, under this clause of the Constitution, Congress have power to lay duties, imposts, and excises on the District of Columbia. They have, also, power to levy a direct tax upon it, preserving the principle of apportionment established by the Constitution. (u)

Where a fortress within the acknowledged limits of a State was surrendered, under the treaty of 1794, with Great Britain, and was afterwards constantly possessed and garrisoned by the United States, but was never purchased from the State by the United States, or ceded to the latter by the former, the United States do not possess the right of exclusive legislation, or exclusive jurisdiction over such fortress, but crimes committed therein, may be punished under the laws, and by the Courts of the State. To give the United States exclusive legislation and jurisdiction over a place, there must be a free cession of the same, for one of the purposes specified in the foregoing clause of the Constitution; they cannot acquire it tortiously, or by disseisin of the State, or by occupancy with the tacit consent of the State, when such occupancy is as

(t) *Cohens v. Virginia*. 6 Wheat. 264.

(u) *Loughborough v. Blake*. 5 Wheat. 317.

a military post, for the purpose of protection, though obtained after a treaty by which foreign garrisons were withdrawn from our posts. It was, therefore, held, that a murder committed in the fortress of Niagara, which is within the boundaries of the State of New York, by one soldier of the United States upon another, was punishable under the laws of the State of New York. though that fortress had, ever since the treaty of 1794, with Great Britain, been occupied by the United States as a garrison, as no cession of it ever was made by the State of New York to the United States.(x)

And the rule is the same, although the title to such place be vested in the United States, and it has been occupied by them as a military post; for if there has been no cession by the Legislature of the State to the United States, according to the foregoing clause of the Constitution, the right of legislation and jurisdiction over such place remains, exclusively, in the State where it is situate. Where, therefore, the United States held a lot of ground in the borough of Pittsburg, by title from the former proprietary of Pennsylvania, which they occupied as Fort Fayette, and used as a place of defence, and Congress passed an act, authorising the President to sell it, it was held, that as the laws of the State prohibited under a penalty, any person except a licensed auctioneer, from selling real estate in the borough of Pittsburg, a person not licensed, who sold the lot under the order of the President, was liable to the penalty, and the United States had no privilege of exemption from the law of the State.(y)

When such purchase has been made by the United States, with the consent of the Legislature of a State,

(x) *The People v. Godfrey*. 17 Johns. Rep. 225.

(y) *Commonwealth v. Young*. 1 Hall's Journ. of Jurisprudence, 47. Supreme Court of Pennsylvania.

of a place for the erection of a fort &c, the Courts of the State can no longer take jurisdiction of offences there committed. No indictment, therefore, lies for selling spiritous liquors there, contrary to the laws of the State.^(z) And it seems, the inhabitants of such place cannot exercise any civil or political privileges there, under the laws of the State, inasmuch as they are not bound by its laws, nor held to pay taxes imposed by its authority.^(a)

By an act of Congress passed the 2d March, 1795, sect. 2, where any State hath made, or shall make, a cession of jurisdiction of places where light houses, beacons, buoys, or public piers have been erected or fixed, or may, by law, be provided to be erected or fixed, without reservation, all process civil or criminal, issuing under the authority of such State, or the United States, may be served and executed within the places, the jurisdiction of which has been so ceded, in the same manner as if no such cession had been made. The 1st section of the same act, ratifies former cessions of such places made with the reservation of that right to the State.

Constitution. Art. 1.—Auxiliary and Implied powers.

Art. 1. sect. 8. 17. Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

The word, *necessary*, here, does not import an absolute physical necessity, so strong that the powers of government cannot be exercised without it. The

(z) *Commonwealth v. Clary*. 8 Mass. Rep. 72.

(a) *Ib.* *Commonwealth v. Young*. 1 Hall's Journ. of Jurisprudence, 53.

word, in itself, admits of degrees of comparison. As used here, it means needful, requisite, essential, conducive to: and gives to Congress the choice of the means best calculated to exercise the power they possess. Thus, a State is prohibited by the Constitution, from laying imposts or duties on imports or exports, except what may be *absolutely necessary* for executing its inspection laws. In this case, the word *necessary* has a different meaning from that which it bears in the above clause.(b) This clause, also, is placed among the powers of Congress, not among the limitations of those powers; its terms purport to enlarge, not to restrain them. But, at all events, it leaves the Legislature to exercise its best judgment in the selection of measures, calculated to carry into execution the constitutional powers of the government.(c)

So also the right of Congress to inflict punishments in cases not specified in the Constitution, is a power implied, as necessary and proper to the sanction of the laws enacted by Congress, and to the exercise of the powers conferred on them.(d) The express grant to them of power to punish, is confined to one class of cases, namely, piracies and felonies committed on the high seas, and offences against the law of nations;(e) but the express grant in this class of cases, does not prevent the exercise of the punishing power in any other cases, where it may be a necessary and proper sanction to enforce its decrees. So, by virtue of the incidental power as essential to the be-

(b) *M'Culloch v. Maryland*. 4 Wheat. 413. *United States v. Fisher*. 2 Cranch, 395. See the *United States v. Fries*, 10. Charge of IREDELL J. to the grand jury.

(c) *M'Culloch v. Maryland*. 4 Wheat. 413.

(d) *M'Culloch v. Maryland*. 4 Wheat. 416. *United States v. Fries*, 8. Charge of IREDELL J. to the grand jury.

(e) *Anderson v. Dunn*. 6 Wheat. 233. To this class must, however, be added counterfeiting the securities and current coin of the United States. Const. art. 1. sect. 8. 5. and treason, art. 3. sect. 3.

neficial exercise of the powers vested, Congress has exacted, besides the oath of fidelity prescribed by the 3d section of the 6th article of the Constitution, an oath of office; and might superadd such other oath of office as its wisdom might suggest. And the power to establish post offices and post roads given by art. 1. sect. 8, carries with it on the same principle the power and duty of carrying the mail along the post road from one office to another; the right to punish those who steal letters from the post-office or rob the mail.(e) On the same principle, crimes, the object of which is to subvert by violence, the laws, and institutions of the government, but which fall short of treason, such as a conspiracy to levy war may be punished in such manner as the Legislature may provide.(f) And Congress may inflict punishment on persons committing offences on board a ship of war of the United States, wherever that ship may be.(g)

Under a Constitution conferring specific powers, the power contended for must be granted, or it cannot be exercised.(h) The government of the United States can claim no powers which are not granted by the Constitution, either expressly or by necessary implication. Still, the instrument is to have a reasonable construction; the words are to be taken in their natural and obvious sense, and not to be unnecessarily restricted or enlarged.(i) The nature of a Constitution requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients, which compose those objects, be

(e) *McCulloch v. Maryland*. 4 Wheat. 416, 417.

(f) *Ex parte Bollman and Swartwout*. 4 Cranch, 126.

(g) *United States v. Bevans*. 3 Wheat. 336. See *ante*, Constitution, art. 1. s. 8. 16.

(h) *United States v. Fisher*. 2 Cranch, 395.

(i) *Martin v. Hunter's lessee*. 1 Wheat. 325. *Houston v. Moore*. 5 Wheat. 49.

deduced from the nature of those objects themselves. If it contained an accurate detail of all the subdivisions, of which its great powers will admit, and of all the means by which they may be carried into execution, it would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public.^(k) There is not, therefore, in the whole of the Constitution, a grant of powers, which does not draw after it, others that are not expressed, but which are vital to their exercise : not substantive and independent, but auxiliary and subordinate.^(l)

Among the enumerated powers, we do not find that of establishing a bank or corporation. But there is no phrase in the Constitution which like the articles of confederation, excludes incidental or implied powers. Even the 10th amendment, declaring that the powers not delegated to the United States, nor prohibited to the States are reserved to the States or people, omits the word, *expressly* ; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. So, among the enumerated powers, are the great powers, to lay and collect taxes, borrow money, regulate commerce, declare war, and conduct a navy, raise and support armies. The government entrusted with such ample powers must, also be entrusted with ample means for their execution. The Constitution does not profess to enumerate these means. It does not prohibit a bank or corporation. A corporation is one of the means, and a bank is a species of a corporation convenient, useful, and necessary, in prosecuting the fiscal operations of the government, and fulfilling its

(k) *McCulloch v. Maryland*. 4 Wheat. 407.

(l) *Anderson v. Dunn*. 6 Wheat. 225, 226.

duties. It was not necessary to give expressly the power to establish it: such power passes as incidental to the power expressly given. A law, therefore, incorporating the bank of the United States, with power to establish branches, is a law authorised by the Constitution, and part of the supreme law of the land.^(m)

On the same principles, the acts of Congress securing to the United States a priority of payment out of the effects of their debtor, in all cases of insolvency and bankruptcy, are constitutional acts. The government is to pay the debts of the Union, and is authorised to use the means which appear most eligible to effect that object. It has, consequently, a right to make remittance by bills, or otherwise, and to take those precautions which will render it safe, by establishing a right of priority, out of the effects of an indorser of a bill of exchange, held by it.⁽ⁿ⁾

The different branches of the Legislature have power by implication, to punish by imprisonment, or any other commutation therefor, any person guilty of a contempt towards either of them, whether committed within the walls of their place of meeting, or without: whether within the District of Columbia, or in any part of the United States, and their process against the offender may reach throughout the United States. They have power to arrest a person whom they declare guilty of a breach of their privileges, and of contempt, and to bring him before them for punishment, and their warrant for that purpose duly issued and signed by the speaker and clerk, is a sufficient justification to their sergeant at arms, in executing and obeying it. The grant in the Constitution, of power to punish or expel members, does not abridge this power: that is

^(m) *M'Culloch v. Maryland*. 4 Wheat. 415.

⁽ⁿ⁾ *United States v. Fisher*. 2 Cranch, 395. See *United States v. Bryan and Woodcock*. 9 Cranch, 374.

only a grant of an additional power, which might otherwise have been questioned. They are not bound, in the first instance, to define such contempts, and ascertain their punishment by a legislative act. The modes in which this offence may be committed are not, in their nature susceptible of legislative definition. Such power is indispensably necessary to the security and liberty of the public functionaries and to the safety of the people. But the imprisonment imposed by either branch of the Legislature as a punishment for contempts can endure only during their session. It terminates on their adjournment.(o)

But though Congress, and its branches, have certain implied powers, and Courts possess the implied power to punish contempts, yet, it seems, the judiciary department of the United States does not possess the implied power, to introduce and carry into effect the criminal code of the common law, on the plea that it is necessary to promote the end and object of its creation, and to preserve the government. The legislative power is vested in other departments, and till they make an act a crime, and affix a punishment to it, it is to be regarded, in the view of the judiciary of the United States, as innocent. The legislative authority must likewise, in all cases in which the Constitution does not give the Supreme Court jurisdiction, declare what Courts shall have jurisdiction: as all the other Courts of the United States possess only such jurisdiction as is given to them by Congress.(p)

(o) *Anderson v. Dunn*. 6 Wheat. 598.

(p) *United States v. Hudson and Goodwin*. 7 Cranch, 32. In addition to what is stated, *ante*, 262, it is to be observed, that the understanding now seems to be, that the cases of *United States v. Hudson and Goodwin*, and *United States v. Coolidge*, there referred to, have decided, that the Courts of the United States have not cognisance of offences at common law, unless it be conferred on them by the laws of the United States. See charge of WASHINGTON J. to the grand jury. Circuit Court. Philadelphia, October, 1822, where this position is laid down.

Constitution. Art. 1.—Capitation and Direct Tax.

Art. 1. s. 9. 4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration, herein before directed to be taken.

This clause does not limit the power of levying a direct tax, to the population included in the census, viz. States: but only adopts that as the standard, to fix the proportion, and this standard is to be applied to the District of Columbia, and to the Territories, when Congress think proper to lay such a tax on them. (y)

Constitution. Art. 1.—Tax on Exports.

Art. 1. s. 9. 5. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue, to the ports of one State, over those of another: nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another.

The object of this clause, it seems, was, to prohibit Congress from passing a law, by which a vessel bound to or from a port in any State, should be obliged to enter, clear, or pay duties in any State other than that, to or from which they should be proceeding. If construed literally, the laws regulating the coasting trade, would be unconstitutional, in some of their regulations. It should be read in the words of one of the amendments proposed by the State of North Carolina. "Nor shall vessels, bound to a particular State, be obliged to enter or pay duties in any other: nor, when bound from any one of the States, be obliged to clear in another. (r)

Constitution. Art. 1.—Ex post facto laws.

Art. 1. s. 10. 1. No State shall pass any bill of

(y) *Loughborough v. Blake*. 5 Wheat. 317.

(r) *United States v. Brigantine William*. Opinion of Judge DAVIS. 2 Hall's Law Journ. 259.

attainder *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

Before the establishment of the Constitution of the United States, a State might pass an act of attainder or confiscation, unless prohibited by its own Constitution. But such prohibition would not be implied from clauses in its Constitution, providing for the trial of crimes in the county where they were committed, especially if the offence, for which the attainder took place, was committed out of the State.^(s)

The prohibition in the Constitution, against passing *ex post facto* laws, applies exclusively to criminal or penal cases, and not to civil cases. An *ex post facto* law consists, in declaring an act penal or criminal, which was innocent when done, or raising the grade of an offence, making it greater than it was when committed; or changing the punishment, after the commission of the offence, making it more severe than it was when committed: or finally, altering the rules of evidence, so as to allow different or less evidence to convict the offender, than was required when the offence was committed. But it seems no law is *ex post facto*, that mollifies the rigour of the criminal law.^(t)

The prohibition against passing *ex post facto* laws does not extend to civil cases that merely affect property, because some of the most necessary and important acts of legislation are founded on the principle that private rights must yield to public exigencies. Highways are run through private grounds. Fortifications, light-houses, and other public edifices are necessarily, sometimes, built on soil owned by individuals. In such cases if the owners should refuse voluntarily to accommodate the public, they may be constrained, so far as the public necessities require, and justice is done by allowing them a reasonable

^(s) *Cooper v. Telfair*. 4 Dall. 14.

^(t) *Calder v. Bull*. 3 Dall. 386.

compensation.(u) So if a treaty stipulate for the restoration of property captured by private persons during a war, which is not yet definitively condemned, it seems, there would be no doubt of the constitutionality of such stipulation, and it would be of binding efficacy as to the property, but the nation ought, in a proper case, to make a reasonable compensation for the property.(x)

Therefore, although an act of the Legislature, contrary to the great first principles of the social compact, is not rightful, as, for instance, to make a man a Judge in his own cause: or seizing the property of a citizen honestly acquired, without compensation, or retrospective laws in general,(y) yet, it seems, the law cannot be declared void by a Court of justice, merely because it violates these general principles, if not prohibited by the Constitution of the State in which it is passed, or of the United States.(z)

Thus the Legislature of Connecticut passed a resolution or law, in the year 1795, by which they set aside a decree of the Court of Probate at Hartford, which decree disapproved of a certain will, made in the year 1779, and refused to record it. The Legislature at the same time directed a new hearing by the same Court, which took place, and the will was then approved, and ordered to be recorded. This decree was affirmed, on appeal to the Superior Court of Hartford, and also from thence to the Supreme Court of Errors of the State. In the year 1795, when the Legislature interposed, the period of limitation to appeals,

(u) *Calder v. Bull.* 3 Dall. 400. Constitution, Amendments, art. 5. See *Vanhorne's lessee v. Dorrance.* 2 Dall. 304, and *post.*

(x) *United States v. Schooner Peggy.* 1 Cranch, 109. See *Ware v. Hylton.* 3 Dall. 279.

(y) *Calder v. Bull.* 3 Dall. 386. See *Beach v. Woodhull.* 1 Pct. 2.

(z) *Ib.* IREDELL J. But see *ib.* opinion of CHASE J. *Vanhorne's lessee v. Dorrance.* 2 Dall. 304. *Society, &c. v. Wheeler,* 1 Gall. 105, *post.*

fixed by a statute, had expired. On error to the Supreme Court of the United States, it was held, that granting a new trial or re-hearing by a legislative act, which was in conformity with the Constitution and usage of the State, was not contrary to the Constitution of the United States. It might be considered retrospective, but it was not *ex post facto*.(a)

As to the prohibition against passing a law impairing the obligation of contracts, the following determinations have taken place.

Contracts are of two kinds, executed, and executory. The former is one in which the object of the grant is performed: the latter is that, in which a party binds himself to do, or not to do, a particular thing. The term, *contract*, as used in the Constitution, applies to both, and embraces as well contracts by States as by individuals. A grant by a State is a contract executed, and comes within the meaning of the clause. A law authorising a Governor of a State to convey lands, is a contract executory: and a conveyance pursuant thereto, is a contract executed. Both contain obligations binding on the party.(b)

If, therefore, a State has passed a law not inconsistent with its Constitution, or that of the United States, authorising a conveyance by the Governor of her lands, and such conveyance is made pursuant thereto, and sales are made by the grantees, to purchasers for valuable consideration, without notice of fraud or corruption, a subsequent act of the Legislature of the same State, annulling such law, on the ground that the first law was made fraudulently, and without constitutional authority, because some of the members of the Legislature were guilty of fraud and corruption, is,

(a) *Calder v. Bull*. 3 Dall. 386. See *United States v. Bryan and Woodcock*. 9 Cranch, 374.

(b) *Fletcher v. Peck*. 6 Cranch, 135. *New Jersey v. Wilson*. 7 Cranch, 164.

so far as respects such purchasers, unconstitutional and void, whether considered in regard to the Constitution of the United States, or our free institutions.(c) The colony of New Jersey in the year 1758, purchased, for a tribe of Indians, certain lands within their territory, and by an act of assembly authorising the purchase, and restraining leases or sales thereof, enacted, that the lands should not, thereafter, be subject to any tax. The Indians, afterwards, by virtue of an act of assembly, passed in the year 1801, sold these lands; but this act contained no privilege of exemption from taxes. It was held, that a State law, passed in October 1804, repealing the section in the first law granting an exemption from taxes, was a law impairing the obligation of contracts, and therefore was unconstitutional and void.(d) So, where the Legislature of Virginia, by a statute passed in the year 1776, confirmed and established the rights of the Episcopal Church to all its lands and other property, it was held, that by this act, it vested an indefeasable and irrevocable title: and such title not being inconsistent with the bill of rights or Constitution of Virginia, that State could not, by subsequent statutes passed in the years 1798, and 1801, repeal the first statute, and vest the property of the church in the State or in third persons, without the fault of the corporators.(e) So, it seems, if the Legislature of a State make a constitutional grant to the towns of such State, of glebes of land for the use of religious worship, they cannot afterwards repeal the act, so as to divest the right of the towns under the grant: and if another law be passed, granting to such towns the same glebes for another

(c) *Fletcher v. Peck*. 6 Cranch, 135. See *ante*, 15, and 5 Hall's Law Journ. 354 to 457, where the documents relative to the Yazoo question are given.

(d) *New Jersey v. Wilson*. 7 Cranch, 164.

(e) *Terrett v. Taylor*. 9 Cranch, 52.

purpose, as for the use of the schools of such towns, it confers a right which the towns may, or may not exercise, at their pleasure.(f)

In respect to public corporations, which exist only for public purposes, such as towns, cities, &c. the Legislature may, under proper limitations, change, modify, enlarge, or restrain them, securing however the property for the use of those for whom, and at whose expense, it was purchased: but, as to private corporations, it is different. For, it was held, that the charter granted by the British crown in the year 1769, to the trustees of Dartmouth College, in New Hampshire, by virtue of which they became an eleemosynary corporation for the education of youth, was a contract within this clause of the Constitution; and that laws passed by the Legislature of New Hampshire in the year 1816, new modelling the corporation in essential particulars, without the consent of the trustees, were laws impairing the obligation of a contract, and void.(g)

So, a law discharging a bankrupt or insolvent debtor from his debts, is a law impairing the obligation of contracts, within the Constitution, and is, so far as respects such discharge, unconstitutional and void.(h) And this is the case, although the law be passed prior to the making of the contract.(i) For though a State may, until Congress exercise the power of passing uniform laws on the subject of bankruptcy, enact bankrupt or insolvent laws, yet it cannot pass them in such a manner as to discharge the bankrupt or insolvent from his debts.(k) Nor does it make any

(f) *Town of Pawlet v. Clark*. 9 Cranch, 535.

(g) *Dartmouth College v. Woodward*. 4 Wheat. 518. *Terret v. Taylor*. 9 Cranch, 52.

(h) *Sturges v. Crowninshield*. 4 Wheat. 122.

(i) *M'Millan v. M'Niel*. 4 Wheat. 209.

(k) *Ib.*

difference that the defendant was a citizen of the same State with the plaintiff, at the time the contract was made, and remained such at the time the suit was commenced in its Court. The Constitution of the United States was made for the whole people of the Union, and is equally binding upon all the Courts, and all the citizens.^(l)

A State may, by means of a law, discharge a debtor from imprisonment. It may pass limitation laws, unless they are retrospective. For these only modify the remedy of the creditor, but do not impair the obligation of the contract. So, it may pass usury laws, affecting future contracts,^(m) and divorce laws. But, it seems, a law to dissolve a marriage contract, without any breach on either side, against the wishes of the parties, and without any judicial enquiry, would be a violation of the Constitution.⁽ⁿ⁾

As the Constitution of the United States did not commence its operation until the first Wednesday of March 1789, this provision does not extend to a State law enacted before that day, and operating upon rights of property vested before that time.

The Legislature of the State of North Carolina passed an act in the year 1812, declaring that any Court, rendering judgment against a debtor, between the 31st December, 1812, and the 1st February, 1814, should stay the execution, until the first term or session of the Court after the latter period, upon the defendant's giving two freeholders as securities: but the Supreme Court of that State held the law to be contrary to the clause in the Constitution of the United States, forbidding a State to pass a law impairing con-

(l) *Farmers' and Mechanics' Bank v. Smith*. 6 Wheat. 131. See *Adams v. Story*. 6 Hall's Law Journ. 474.

(m) *Ib.*

(n) *Dartmouth College v. Woodward*. 4 Wheat. 629. 696.

tracts, and declared it to be void.^(o) So, where the Legislature of the State of Missouri enacted, that proceedings should be stayed for two years and a half, on executions whereon the plaintiff should not indorse, that he would take property in payment, at two-thirds of its appraised value, the defendant giving bond with security for the payment of the debt, or pledging real property therefor, and directing the sheriff, where this was done, to release the person or property taken in execution; on a motion for an *alias ca. sa.* the sheriff having returned to a former *capias.* a bond taken pursuant to the act, the Court decided, that the act of the Legislature was contrary to the Constitution of the United States, forbidding the passage of a law impairing the obligation of contracts, and declaring (Art. 1. sect. 10. 1,) that no State shall make any thing but gold and silver coin a tender in payment of debts,^(p) and was, moreover repugnant to the Constitution of the State of Missouri, which declares, that justice and right ought to be administered without sale, denial, or delay.^(q)

A State law, establishing gaol liberties, has been held not to be within the prohibition contained in this clause of the Constitution.^(r)

A law of a State contrary to its own Constitution is void, and, it seems, may be so declared by a Court of the United States, when the matter is judicially before them. But, to authorise such a decision the law must be a clear and unequivocal breach of the Constitution,

(o) *Crittenden v. Jones.* 5 Hall's Law Journ. 520. See *Grimball v. Ross.* 2 Hall's Law Journ. 93. *Golden v. Prince.* 2 Hall's Law Journ. 507.

(p) See *Golden v. Prince.* 5 Hall's Law Journ. 507.

(q) *Glasscock v. Steen.* Circuit Court of the county of St. Louis, Missouri, by TUCKER J. *The Missourian*, April 4, 1822. See *ib.* stated *ib.*, that Judge HAYWOOD, in Tennessee has pronounced, on the same principles, that such a law impairs the obligation of contracts, and is therefore void.

(r) *Holmes v. Lansing.* 3 Johns. Cas. 73.

not doubtful or argumentative.^(s) Thus, a law of the State of Pennsylvania passed in the year 1787, which took land from certain persons, and gave it to others, and made compensation to the owners by grants of other lands, and declared that the value of the land surrendered, and the quantity of the equivalent, should be determined by the Board of Property constituted under its laws, was held, by the Circuit Court of the United States to be contrary to the letter and spirit of the Constitution, which the State at that time had, and void, because it took away land from the owner without a compensation in money, and because the value and equivalent were not to be determined either by the parties, commissioners mutually elected, or by a jury, but by a board appointed by the Legislature who were one of the parties.^(t) So, an act of assembly was passed by the Legislature of New Hampshire, in the year 1805, by which the occupant of land for six years before an action brought, holding by virtue of a supposed legal title, under a *bona fide* purchase, was entitled, on recovery of the land against him, to the increased value of the buildings, and improvements made by him or those under whom he claimed, to be assessed by the jury that found a verdict for the plaintiff, and paid before execution issued, and within one year after verdict, otherwise no writ of possession to issue. This was held not to be an *ex post facto* law, nor a law impairing the obligation of contracts; the compensation being for a tort, in respect to which the Legislature created, but did not destroy a contract. But it was held to be a retrospective law, if it were construed to extend to improvements made before the act of assembly: and, as the Constitution of New Hampshire forbade retrospective laws, either for the

(s) *Cooper v. Telfair*. 4 Dall. 19. See *Calder v. Bull*. 3 Dall. 302. Opinion of CHASE J. *Ware v. Hylton*, ib. 266.

(t) *Vanhorne's lessee v. Dorrance*. 2 Dall. 304.

decision of civil causes, or the punishment of offences, it was, as related to such improvements, unconstitutional and void. Upon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new regulation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective. A limitation law as to land, *in futuro*, within a limited time after passing a law, or after a disseisin, would be constitutional. But, it seems, it would be otherwise as to a law barring all rights of recovery upon past disseisins without any allowance of time.(u)

(u) Society, &c. v. Wheeler. 1 Gall. 105.

CHAPTER XXIX.

Constitution. Article II.

CONSTITUTION. ART. II.—EXECUTIVE POWER.

ART. 2. s. 1. 1. The executive power shall be vested in a President of the United States of America.

The department of state is one of the organs of the executive branch of the government, established for the purpose of facilitating the operations of that branch, so far as the duties assigned to it extend. It is to this department a reference must be made, for the official acts of the President, in relation to those public measures which he may establish, and which are not more immediately connected with the duties of some other department. This has been the general practice of the government, and is fully warranted by law. Nevertheless, the President, for the more easy and expeditious discharge of his executive duties, may direct some other department to make known the measures, which he may think proper to adopt. They are equally his acts whether they emanate from the department of state, or from any other department. Nor is it necessary, that the President's orders, under an act of Congress, should be sealed, to give them validity. No law or usage requires it.(a)

(a) *Lockington v. Smith*. 1 Pct. 471. WASHINGTON J. See the case of *Jonathan Robbins*, *post.* and *post.* Constitution, art. 2. s. 2. 2.

Constitution. Art. 2.—President.

Art. 2. s. 2. 1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States.

The President may, it seems, during a war declared by Congress, accept or propose an armistice; *(b)* yet he has no power to suspend judicial proceedings on prizes made. A capture, if lawful, vests a right over which he has no controul. *(c)*

How far the President would be entitled in his character of commander in chief of the army and navy of the United States, independently of any provision by act of Congress, to issue instructions for the government and direction of privateers, commissioned by him during war, is not decided. But if, by act of Congress, the President be authorised to issue such commissions, in such form as he shall see fit, and to grant, annul, and revoke the same at his pleasure, and to establish and order suitable instructions for the better governing and directing the conduct of private armed vessels, commissioned under act of Congress, he may issue instructions, directing them not to interrupt certain vessels or property, which, otherwise, would be liable to capture. *(d)*

Constitution. Art. 2.—Appointment.

Art. 2. s. 2. 2. The President shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not

(b) Letters of the secretary of state, June 26, July 27, August 21, 1812. 9 Wait's State Papers, 79. 61. 66.

(c) *Ib.* August 21, 1812. 9 Wait's State Papers, 66. See *post.* Constitution, art. 2. s. 3. 1. and art. 6. s. 2.

(d) The Thomas Gibbons. 8 Cranch. 126.

herein otherwise provided for, and which shall be established by law. But Congress may by law, vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or in the heads of departments.

Under this section, and the 3d section of the act of 15th September, 1789, when the President has nominated to the Senate, and the Senate approved, and the President has signed the commission, the appointment is made. If the officer be removable at the will of the executive, the act being at any time revocable, the commission may be arrested, if still in the office of the Secretary of State; but if the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. The appointment and commission are distinct. The former is complete when the commission is signed by the President. Such signature is a warrant for affixing the seal, and the Secretary of State is by law bound to affix the seal. He acts in this respect, under the authority of the law, and not by the instructions of the President. Delivery is not essential to the validity of a commission: the detention of the commission does not affect its validity, nor does its loss or destruction. The copy of the record is sufficient, and that record is considered as made when the authority and order to make it are given: and they are by law given when the commission is signed and sealed. Nor is acceptance of the commission necessary to vest the office. It bears date, and the salary is received, from the appointment: and if the person appointed refuse to accept, the successor is appointed in his place, and not in the place of a former incumbent who had created the vacancy. It was, therefore, held, that where by act of Congress Justices of the peace were to be appointed by the President, by and with the advice and consent of the Senate, for the District of Co-

lumbia, to continue in office five years, and in compliance with this law the President signed commissions for that office, after which the seal of the United States was affixed to them, that though the commissions were not delivered by the Secretary of State, the persons were duly appointed, and had a right to the commissions.(e)

In respect to the liability of the heads of departments to the inquiry of a Court of Justice, it is held, that whether the legality of an act of the heads of a department be examinable in a Court of Justice, or not, depends on the nature of it. If such officer be the organ of the President, through whom he exercises that discretion in political affairs, which is vested in the President by the Constitution or laws, the acts of such officer, in that respect, are not examinable in a Court of justice. But when the Legislature imposes other duties; when he is directed peremptorily to perform certain acts, when the rights of individuals depend on the performance of those acts, he is the officer of the law, and amenable to the law. As, for instance, if the Secretary of war should refuse to place on his pension list a person directed to be placed there by the act passed in June 1794; or the Secretary of State should withhold a patent regularly issued, or refuse a copy where it was lost, or a commission duly signed and sealed.(f)

How far the President, heads of departments, and their clerks, are bound to attend on a *subpœna*, and give evidence, has been already treated of.(g)

In organising the departments of the executive by the first Congress, the question occurred in the House of Representatives, in what manner the officers who were to fill them should be removable. It was con-

(e) *Marbury v. Madison*. 1 Cranch, 137.

(f) *Ib.*

(g) *Ib. ante*, 160. 163.

tended, that the power of removal was an incident to the power of appointment, and as the Senate was, by the Constitution, associated with the President in making appointments, the Senate ought in like manner to participate in the power of removal. But it was determed by Congress, that the power of removal belonged to the President, by virtue of the clause in the Constitution vesting in him the executive power, and other parts of that instrument, and this construction has since prevailed.^(h)

Art. 2. s. 2. 3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

In the year 1814, President MADISON granted commissions to ministers to negotiate the treaty of Ghent, in the recess of the Senate. The principle acted upon in this case, however, was not acquiesced in, but protested against, by the Senate at their succeeding session. And, on a subsequent occasion, April 20th, 1822, during the pendency of the bill for an appropriation to defray the expenses of missions to the South American States, it seemed distinctly understood to be the sense of the Senate, that it is only in offices that become vacant during the recess, that the President is authorised to exercise the right of appointing to office, and that in original vacancies where there has not been an incumbent of the office, such a power under the Constitution does not attach to the executive. An amendment that had been proposed, providing that the President should not appoint any minister to the South American States, but with the advice and consent of the Senate, was, therefore, withdrawn as unnecessary. And in a report of a committee of Senate, made on the 25th April, 1822,

(h) 5 Marshall's Life of Washington, 196. Debates of the first Congress. See *Commonwealth v. Bussier*. 5 Serg. & Rawle, 451, and *post*.

it is declared, that the words, "all vacancies that may happen during the recess of the Senate," mean vacancies occurring from death, resignation, promotion, or removal. The word, *happen*, has reference to some casualty not provided for by law. If the Senate be in session when offices are created by law, which were not before filled, and nominations be not then made to them by the President, the President cannot appoint after the adjournment of Senate, because in such case, the vacancy does not happen during the recess. In many instances, where offices are created by law, special power is given to the President to fill them in the recess of Senate : and in no instance has the President filled such vacancies without special authority of law.(i)

On the last mentioned occasion, the authority of the President in making appointments, presented itself in another point of view. The measures under consideration of the Senate, were those pursued by President MONROE, for carrying into effect the act to reduce and fix the military establishment of the United States, passed the 2d March, 1821. It is stated by the President in his message to the Senate, that in filling original vacancies, that is, offices newly created, it was his opinion, as a general principle, that Congress have no right, under the Constitution, to impose any restraint, by law, on the power granted to the President, so as to prevent his making a free selection of proper persons for the offices in question, (colonel of artillery, and adjutant general,) from the whole body of his fellow citizens ; and, that if the law imposed such restraint, it was void.(k) The report above

(i) See the report above referred to, Niles's Reg. 29th August, 1822. See the act to regulate the collection of duties on imports and tonnage, passed 2d March, 1799, sect. 17. Act of May 1st, 1800, fixing the compensation of public ministers, &c. sect. 2.

(k) Message to Senate, 12th April, 1822. Niles's Reg. 24th August, 1822.

mentioned states, on this point, that the Constitution provides, that "Congress shall have power to make rules, for the government and regulation of the land and naval forces."^(l) Under this article of the Constitution, it is competent for Congress to make such rules and regulations for the government of the army and navy, as they think will promote the service. This power has been exercised from the foundation of our government, in relation to the army and navy. Congress have fixed the rule in promotions and appointments. Every promotion is a new appointment, and is submitted to the Senate for confirmation. In the several reductions of the army and navy, Congress have fixed the rules of reduction, and no executive, heretofore, had denied this power in Congress, or hesitated to execute such rules as were prescribed. But the committee did not dispute the power of the President to discharge an officer from the land or naval service.^(m)

Constitution. Art. 2.—President.

Art. 2. s. 3. 1. The President shall take care that the laws be faithfully executed.

If the President give instructions to the commanders of armed vessels, to detain vessels at sea, in cases not warranted by an act of Congress, from a misconstruction of such act, they do not excuse such commanders from liability to damages for committing a trespass in obeying them. The instructions of the President cannot change the nature of the transaction, or legalize an act which, without them, would be a plain trespass. Therefore, where an act of Congress authorised the commanders of armed vessels to detain American vessels bound to a French port, and the Pre-

^(l) Constitution. Art. 1. s. 8. 13.

^(m) Report of the Committee of Senate. Niles's Reg. 29th August, 1822. See the Constitution. Art. 1. s. 8. 15.

sident, by his instructions to such commanders, authorised and required them to detain American vessels bound *to or from* a French port, it was held, that the captains of two United States frigates who, under these instructions, captured and detained a Danish vessel suspected to be American, bound *from* a French port, were liable in damages for so doing, and that the instructions of the President would not excuse them.(*n*)

In the year 1793, President WASHINGTON determined to request the answers of the Judges of the Supreme Court of the United States, to a series of questions, comprehending all the subjects of difference, existing between the executive and the minister of France, relative to the treaties between the two countries;(o) but considering themselves only as a legal tribunal, for the decision of controversies brought before them in legal form, the Judges declined any declaration of opinion, on questions not growing out of a case legally brought before them.(*p*)

Constitution. Art. 2.—Impeachment.

Art. 2. s. 4. 1. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

William Blount, then a Senator of the United States, was impeached by the House of Representatives of the United States in the year 1797, for conspiring and contriving, while such Senator, to carry on a military expedition against the Spanish territories, the Floridas, and Louisiana, and for other misdemeanors, but the Senate decided, that he was not a civil officer

(*n*) Little v. Barreme. 2 Cranch, 119. United States v. Bright, 3 Hall's Law Journ. 229.

(o) 5 Marshall's Life of Washington, 433.

(*p*) Ib. 441. See *ante*, 71.

within the meaning of this clause, and was therefore, not liable to impeachment.(q)

In January, 1804, JOHN PICKERING, Judge of the District Court of the United States for New Hampshire, was impeached by the House of Representatives of the United States, on four articles. 1st, For misbehaviour as a Judge, in ordering the delivery to the claimant of goods seized by the collector without requiring security. 2d, In refusing to hear evidence offered on the part of the United States, to shew a forfeiture of said goods. 3d, In refusing to allow the United States to appeal from his decree, in a case of admiralty and maritime jurisdiction, where the matter in dispute exceeded three hundred dollars. 4th, For appearing on the bench, for the purpose of administering justice, in a state of total intoxication, produced by the free and intemperate use of inebriating liquors, and then and there frequently, in a most profane and indecent manner invoking the name of the Supreme Being. He was found guilty on all these charges, by a constitutional majority of the Senate, and a sentence of removal from office was passed, on the 12th March, 1804.

In the years 1804, and 1805, an impeachment was instituted, and tried, against SAMUEL CHASE, then one of the Justices of the Supreme Court of the United States, on eight charges of misbehaviour in his official capacity, but he was acquitted, there not being a constitutional majority against him, on any one article.(r)

These, it is believed, are the only cases of impeachment, tried under the present Constitution of the United States.

(q) Proceedings on the impeachment of Wm. Blount. Pamph. See Report of Senate in the case of John Smith. 1 Hall's Law Journ. 463, *ante*, 286.

(r) See proceedings on the impeachment of Judge CHASE.

CHAPTER XXX.

Constitution. Article III.

CONSTITUTION. ART. III.—JUDICIARY.

ART. 3. sect. 1. 1. The Judges both of the Supreme and Inferior Courts shall hold their offices during good behaviour, and shall at stated times, receive, for their services, a compensation, which shall not be diminished during their continuance in office.

An act of Congress was passed on the 27th February, 1801, for the appointment, by the President, of Justices of the peace for the District of Columbia, to be commissioned for five years, and to have jurisdiction in personal demands of the value of twenty dollars ; and by that act, and the act of 3d March, 1801, they were authorised to take certain fees. These acts were repealed by the act of 3d May, 1802, so far as related to their compensation. It was held, by the Circuit Court of the District of Columbia, (KILTY J. diss.) that such Justices of the peace, appointed prior to the repealing act of 3d May, 1802, were to be considered as Judges of inferior Courts, within this clause of the Constitution, and that no act of Congress could, during the period of their appointment, diminish, or take away their compensation. They therefore adjudged on demurrer, that an indictment would not lie against one of these Justices, for taking fees after the repealing act. The point was, afterwards, argued in the Supreme Court of the United States, on error

brought, but no opinion was given ; the Court holding, that no writ of error lay in a criminal case.(a)

It has been since held, by the general Court of Virginia, that the mere authority to perform a judicial act, vested in a person by an act of Congress, does not constitute such person a Judge or a Court, within the grant of judicial power described in the Constitution, or within the above clause of the Constitution. Thus a custom house officer, commissioner of the revenue or excise, commissioner to take depositions, commissioner in bankruptcy, or to settle various other incidental and occasional matters, though authorised to administer an oath, which is a judicial act, are not so to be considered. The commissioners to decide on the claims to the Louisiana fund, and those now deciding on the claims on the Florida fund, must exercise quasi judicial powers, yet they are not to be considered Judges within this clause. The Constitution, in speaking of Courts and Judges, means those who exercise all the regular and permanent duties which belong to a Court, in the ordinary and popular signification of the term.(b)

It was contended in Congress, in the year 1802, that after Congress had once established inferior Courts, under art. 1. sect. 8, of the Constitution, they could not constitutionally abolish those Courts, and thereby deprive the Judges of their offices, and, therefore, that the act of 8th May, 1802, abolishing the system of Circuit Courts, established by the act of 13th February, 1801, under which sixteen Circuit Judges had been

(a) *United States v. More.* 3 Cranch, 159. See *Wise v. Withers.* 3 Cranch, 336, where it is decided by the Supreme Court, that a justice of the peace in the District of Columbia is an officer of the government of the United States, and it is stated, that his powers, as defined by law seem partly judicial, and partly executive. See *ante*, 273, 274.

(b) *Ex parte Pool and others.* General Court of Virginia. *Nat. Intell.* Dec. 11, 1821, *ante*, 274.

appointed, was unconstitutional. But the act was, notwithstanding, passed, and the system was abolished. The question was, afterwards, argued in the Supreme Court in the year 1803, but the case was decided on different grounds.(c)

Constitution. Art. 3.—Treason.

Art. 3. s. 3. 1. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open Court.

Sect. 3. 2. Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

By the act of 30th April, 1790, sect. 1, if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open Court, or on the testimony of two witnesses to the same overt act, of the treason whereof he, she, or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.

The term, levying war, is a technical term, borrowed from the English law, and its meaning is the same as it is when used in the statute 25 Edw. III, and is to be collected, as well from adjudged cases, as from the writings of approved elementary authors, such as Coke, Hale, Foster, and Blackstone.(d) It compre-

(c) *Stuart v. Laird*. 1 Cranch, 299.

(d) *United States v. Burr*. 4 Cranch, 470, 471. *United States v. Fries*. Trial. 167.

liends, as well those who create or raise a war, as those who make it, or carry it on. (e)

A conspiracy to levy war is not treason. (f) nor is a secret unarmed meeting of conspirators, not in force, nor in warlike form, though met with a treasonable intent. (g) Nor, it seems, is the actual enlistment of men, to serve against the government. (h) But they are high misdemeanors, and punishable in such manner as Congress may provide. (i)

An insurrection, the object of which is to suppress an office of excise established under a law of the United States, and to compel the resignation of the excise officer, and marching with a party to the house of such officer in arms, marshalled and arrayed, and committing acts of violence and outrage there, with a view to render void an act of Congress, or to prevent its execution, by force or intimidation, is a levying of war against the United States. (k) So if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, they are only guilty of a high misdemeanor: but, if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war, and the quantum of the force employed neither increases nor diminishes the crime; whether it be one hundred or one thousand persons, is immaterial. (l) And any combination, to subvert by force, the government of the United States, violently to dismember the union, to compel a change in the

(e) United States v. Burr. 4 Cranch, 471, 471.

(f) Ex parte Bollman and Swartwout. 4 Cranch, 126.

(g) United States v. Burr. 4 Cranch, 486.

(h) Ex parte Bollman and Swartwout. 4 Cranch, 126.

(i) Ib.

(k) United States v. Vigol. 2 Dall. 346. United States v. Mitchell. 2 Dall. 355.

(l) United States v. Burr. 4 Cranch, 480. United States v. Fries, 196.

administration, to coerce the repeal or adoption of a general law, or to revolutionize a territorial government by force, although this be merely a step to, or a mean of executing some greater projects, *(m)* is a conspiracy to levy war, and if the conspiracy be carried into effect by the embodying and assembling of men in force, and in a military posture, for the purpose of executing the design, it is treason by levying war. *(n)* But if the intention of such conspiracy be merely to defeat the operation of a law in a particular instance, or through the agency of a particular officer, from some private or personal motive, though it is a high offence, it is not treason. *(o)*

To make such assemblage treasonable, it must be in force, and in a warlike posture; or, in other words, it must be an assemblage in a condition to make war, and with such appearance of force as would justify the opinion, that they met for that purpose; otherwise, an assemblage, be the design ever so treasonable, is not treason by levying war. *(p)* The character of such assemblage must unequivocally appear. It is not indispensably requisite that such assemblage should have arms, nor that hostilities should have commenced, by engaging the military force of the United States, or that force or violence should be applied; *(q)* except, perhaps, where the design is, not to overturn the government, but to resist the execution of a law; for there the Judges of the United States seem to have required this. *(r)* But, when a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war,

(m) United States v. Burr. 4 Cranch, 483.

(n) Ib. 487.

(o) United States v. Fries. Trial, 14. Charge of IREDELL J.

(p) United States v. Burr. 4 Cranch, 475. 487.

(q) Ib. 475. 487.

(r) Ib. 475. 481.

the assemblage is an act of levying war.(s) So, if men be enlisted, and march prepared for battle, or in a condition for action, it is an overt act of levying war, though they do not come to battle or action.(t) So is cruizing under a commission from an enemy, in a warlike form, and in a condition to assail those of whom the cruizer is in quest.(u)

The travelling of individuals, either separately or together, to the place of rendezvous, in pursuance of the conspiracy to levy war, but not in military form, would not, it seems, constitute levying war: but the meeting of particular bodies, and marching in a military form, or embodying in that form in the first instance, would be sufficient to constitute it.(v)

In respect to those who are to be considered as levying war, not only persons, leagued in the conspiracy, who bear arms, but those who perform the various and essential parts of prosecuting the war which must be assigned to different persons, may be said to levy war.(x) As a commissary of purchases who never saw the army, but, knowing its object, and leaguering himself with the rebels, supplied that army with provisions; or a recruiting officer, holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned him.(y) But this does not embrace the case of persons who perform no act in the prosecution of the war, who only counsel or advise it, or who, being engaged in the conspiracy, fail to perform their part. Whether such persons may be implicated by the doctrine, that whatever would make a man an accessory

(s) United States v. Burr, 4 Cranch, 475.

(t) Ib. 478.

(u) Ib.

(v) Ib. 485.

(x) Ib. 472, 473. 502. Ex parte Bollman and Swartwout. 4 Cranch.

(y) United States v. Burr. 4 Cranch, 470.

in felony, makes him a principal in treason, or whether that doctrine is inconsistent with the Constitution of the United States, is a question not determined.(z)

As a general principle, it is more safe, as well as more consonant to the principles of our Constitution, that the crime of treason should not be extended by construction to doubtful cases, and that crimes, not already within the Constitutional definition, should receive such punishment as the Legislature, in its wisdom, may provide.(a)

Where a statute of a State declares treason against the State to consist in levying war against it, within the State, or adhering to its enemies, giving them aid and comfort there, or elsewhere, treason against such State may be committed by an open and armed opposition to the laws of the State, or a combination and forcible attempt to overturn or usurp the government. And indeed, the State in its political capacity may, under certain special circumstances, pointed out by the Constitution of the United States, be engaged in war with a foreign enemy. But, adhering to the enemies of the United States, during war between the United States and a foreign power, is not treason against a State. Nor is treason against the United States, cognisable in the Courts of a State. The Supreme Court of New York, therefore, notwithstanding a law of the State to the effect above mentioned, on motion, quashed an indictment found against the defendants which, after setting out a state of war between the United States and Great Britain, declared and carried on under the authority of the United States, alleged, that the defendants, being citizens of the State of New York, and of the United States, as traitors of the State

(z) *United States v. Burr.* 472, 3. 501. See *United States v. Fries*, 199.

(a) *Ex parte Bollman and Swartwout.* 4 Cranch. *United States v. Burr.* 4 Cranch, 486.

of New York, did adhere to, and give aid and comfort to the enemy, by supplying them with provisions of various kinds, on board of a public ship of war, upon the high seas.(b)

An indictment for levying war against the United States, must specify an overt act, stating the place at which it was committed, and the particular manner in which the war was levied. It is not sufficient to allege generally, that the accused had levied war against the United States.(c) The overt act laid in the indictment must be proved; for though it may not, of itself, be the treason of which the party was guilty, it is the sole act of treason which can produce conviction on that indictment.(d) If the party were absent at the overt act, he cannot be indicted as present and convicted, on evidence that he procured the treasonable act.(e) Being present, and procuring, are distinct acts, and ought not to be charged as the same.(f) Those who are actually or legally present at the overt acts are principals: procurers, who are absent at the overt act, are accessaries.(g) The latter cannot be convicted till some one of the former is convicted, and the record produced;(h) and the necessity of this is not waved by the prisoner's pleading to an indictment, charging him as principal.(i) If, therefore, the party be charged with an overt act at a particular place in a State, and the evidence be of an overt act by others at that place, yet, if he were at a great distance, and in another State, he cannot be considered

(b) *The People v. Lynch and others.* 11 Johns. 553.

(c) *United States v. Burr.* 4 Cranch, 490.

(d) *Ib.* 490. 493.

(e) *Ib.* 493.

(f) *Ib.* 497. 502. 505.

(g) *Ib.* 503.

(h) *Ib.* 503. 505.

(i) *Ib.* 505.

constructively present by counselling, inciting, aiding, or procuring, such overt act.^(k)

The overt act laid, must be proved by two witnesses, to have been committed within the district. The actual or legal presence of the party, or the procurement by him, must be proved by two witnesses.^(l) No presumptive evidence will satisfy the Constitution and law. And if the indictment charge the defendant with levying war at a particular place in a State, and specify the overt act, and there is no witness who has proved his actual or legal presence, but the fact of his absence in another State is not controverted, evidence is not admissible of subsequent transactions at a different place, but the Court will reject all testimony of that kind at once, generally, without deciding particularly on each witness as adduced. No testimony, in its nature corroborative or confirmatory, is admissible, if the overt act be not proved by two witnesses.^(m)

The words in this section, "owing allegiance to the United States," are entirely surplus words, which do not, in the slightest degree, affect its sense. The construction would be precisely the same, were they omitted. Treason is a breach of allegiance, and can be committed only by him who owes allegiance, perpetual or temporary. The 2d section, therefore, in which there are not these words will receive the same construction, in this respect, as the first.⁽ⁿ⁾

As to evidence in treason, where a letter was circulated during an insurrection by the leaders of the insurrection, calling a meeting, an alleged copy, proved by a witness to be conformable in substance to the original, no evidence being given that the original letter was lost, or that the copy was in all respects cor-

^(k) United States v. Burr. 4 Cranch, 491. 494.

^(l) Ib. 496. 503.

^(m) Ib. 506, 507.

⁽ⁿ⁾ United States v. Wiltberger. 5 Wheat. 97.

rect, was held not to be evidence. But it seems if such copies were circulated at the time of the insurrection, one of them would be evidence.(o)

On an indictment for treason, testimony of a robbery of the mail, for which another indictment is found against the prisoner, and of which no evidence had been given that it was committed with a traitorous intention, cannot be admitted.(p)

On the trial of an indictment for treason in levying war, as the crime consists in the overt act of levying war, and the treasonable intention, evidence to either point is relevant; and the Court will not prescribe to the attorney of the United States the order in which such evidence shall be given. He may first give evidence of the treasonable intention. But such intention means, the intention with which the overt act was committed, and relevant to the overt act, not a general evil disposition, or an intention to commit a distinct fact. The latter is admissible only by way of corroboration as to the intention, and, therefore, ought to follow what it is to corroborate.(q)

It seems certain, that conversations or actions at a different time and place may be given in evidence, as corroborative of the overt act of levying war, after that has been proved in such a manner as to be left to a jury: but whether, in case where the intent cannot be inferred from the fact, and is not proved by declarations connected with the fact, among which are to be included the terms under which an assemblage was to be convened together, this defect can be supplied by extrinsic testimony, not applying the intent conclusively to the particular fact, *query*.(r)

The confession of the defendant, before a magistrate out of Court, is not sufficient to convict of trea-

(o) United States v. Mitchell. 2 Dall. 357.

(p) Ib.

(q) United States v. Burr. Trial, 469. 472.

(r) Ib. Appx. 2 pt. 212. See United States v. Fries, 174.

son: but after the overt act of treason is proved by two witnesses, it is evidence by way of corroboration.^(s)

It is intimated that though the Constitution declares, that two witnesses are necessary to produce conviction, yet it may not be so strictly and absolutely necessary to authorise an indictment being found a true bill: and that though there must be two witnesses to the general charge of treason, yet, for the purpose of finding a bill, one witness may be sufficient to prove one overt act, and another to prove another.^(t)

^(s) United States v. Fries. 171.

^(t) United States v. States. Trial, 196, per MARSHALL C. J. See *contra* United States v. Fries. Trial, 14. Charge of IREDELL J. See further, on the subject of treason, *ante*, Chapter XXV

CHAPTER XXXI.

Constitution. Article IV.

CONSTITUTION. ART. IV.—RECORDS AND LAWS.

ART. 4. s. 1. 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Accordingly, by the act of May 26, 1790, sect. 1, it is enacted, that the *acts of the Legislatures* of the several States shall be authenticated, by having the seal of their respective States affixed thereto. The *records and judicial proceedings* of the Courts of any State shall be proved or admitted in any other Court, within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every Court within the United States, as they have, by law or usage, in the Courts of the State from whence the said records are or shall be taken.

By another act on the subject passed on the 27th March, 1804, sect. 1, all records and exemplifications of *office books* which are or may be kept in ar

public office of any State, *not appertaining to a Court*, shall be proved or admitted in any other Court or office in any other State, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the Court of the county or district, as the case may be, in which such office is or may be kept, or of the Governor, the Secretary of State, the Chancellor or the Keeper of the Great Seal of the State, that the said attestation is in due form, and by the proper officer. And the said certificate, if given by the presiding justice of a Court shall be further authenticated by the clerk or prothonotary of the said Court, who shall certify under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified. Or, if the said certificate be given by the Governor, the Secretary of State, the Chancellor, or Keeper of the Great Seal, it shall be under the Great Seal of the State in which the said certificate is made.

And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every Court and office within the United States, as they have, by law or usage, in the Courts or offices of the State from whence the same are or shall be taken.

Sect. 2. provides, that all the provisions of this act, and the act to which this is a supplement, (March 26, 1790,) shall apply as well to the public acts, records, office books, judicial proceedings, Courts, and offices of the respective Territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, Courts, and offices of the several States.

These laws, therefore, embrace,

1. Acts of the State Legislatures.
2. Records and judicial proceedings of State Courts.
3. Office books kept in a State office, not appertaining to a Court.

1. Acts of the State Legislatures.

An exemplification of an act of the Legislature of one of the States, under the Great Seal of such State, is evidence, though not attested by the Governor, or any other principal officer of the State.^(a) But, it seems, the Seal is indispensable: for though the acts of the Legislature of Maryland were read from the statute book published by authority, to prove the incorporation of an insurance company, which the prisoner was charged with design to prejudice, by destroying his vessel which had been insured by them, yet there the objection was not made.^(b) and in a subsequent case, a law of the Territory of Orleans, printed in a small pamphlet in the English and French languages, to which no seal whatever was affixed, was held to be inadmissible on a question of bail, to shew the insolvent law of that Territory, because it was not authenticated under the seal of the State of Louisiana, (which that Territory afterwards became,) as the act of Congress requires.^(c)

2. Records and judicial proceedings of State Courts.

The "due form," intended by the acts of Congress, is that of the State or of the Court whence the record comes. That this is the form intended, is inferrible from the circumstance, that Congress has prescribed

^(a) United States v. Johns. 4 Dall. 415.

^(b) Ib. Yet see Jones v. Maffet. 5 Serg. & Rawle. 523.

^(c) Craig v. Brown. 1 Pet. 352.

none, and that it is not to be supposed that the Judge, who gives the certificate, should be acquainted with any other form than that of his own State or Court, which is prescribed in his own State, by positive law, or practice.(d) The certificate of the presiding Judge, is the only evidence of the fact, that the attestation is in due form.(e) And if the clerk attest, that "the foregoing is *truly taken* from the records of the Court," and the presiding Judge certify it to be in due form, it is conclusive, and no other evidence can be received to shew that it is not in due form.(f) But a certificate of the presiding Judge, that the person whose name is signed to the attestation of a record, is clerk of the Court, and that the signature is his proper handwriting, without stating that the attestation is in due form, is not sufficient.(g) Nor will the Court inquire, in such case, whether the attestation appears on its face to be in due form, nor whether the certificate of the Judge amounts to an allegation that it is in due form, and, therefore, the law is substantially complied with.(h) Such record is not sufficient for any purpose, either as evidence on a trial, or on a question of bail.(i) So, where on an appeal in equity, from a Circuit Court, it appeared, that an exhibit, stated by the complainant in his bill, and denied in the answer, consisted of a certificate of a clerk of a State Court, of a copy of a deed taken from the records of the Court, but there was no certificate that the attestation was in due form, it was held, that the instrument so certified, could not be noticed by the Court, as a copy of such deed, and, inasmuch as it was the foundation of the complainant's right, the Court erred

(d) Craig v. Brown. 1 Pet. 352.

(e) Ib.

(f) Ferguson v. Harwood. 7 Cranch, 408.

(g) Craig v. Brown. 1 Pet. 352.

(h) Ib.

(i) Ib.

in decreeing in their favour, on such defective evidence. The decree was reversed, but as the objection was technical, and not made below, the record was remanded for further proceedings.(*k*)

A certificate of an affidavit taken before a magistrate, must state the place where the affidavit was taken, so as to shew that the magistrate had jurisdiction to administer the oath. If the place be omitted, it cannot be received as evidence, on a hearing before a Court of the United States, on a motion to commit on a criminal charge. Nor is such omission helped by the certificate being dated at a place where the magistrate had jurisdiction.(*l*) Thus, where the affidavit purported to be taken before B. C., a certificate annexed that B. C. was a Justice of the peace, without stating that such Justice was the same B. C. before whom the affidavit was taken, was held not to be good.(*m*) Such certificate must be as certain and precise as the nature of the case admits of.(*n*) But the certificate that a person is a magistrate, and that full faith is due to his acts, implies that he has qualified by taking the necessary oaths.(*o*)

It seems, that where a seal had belonged to a Court, before the Territory in which it is situated was erected into a State, and no new seal is provided, it might continue to be the seal of the Court under the new government.(*o*) But if the fact be that the Court, whose record is certified, has no seal, this fact should appear either in the certificate of the clerk, or in that of the Judge.(*p*) And if the certificate of the clerk state the seal affixed, to be that of a late Territory, and

(*k*) *Drummond's administrators v. Magruder*. 9 Cranch, 122.

(*l*) *United States v. Burr*. 96. 98.

(*m*) *Ib.*

(*n*) *Ib.*

(*o*) *Ib.* 109. See also *Ex parte Bollman and Swartwout*. 4 Cranch, 114. 129. *Craig v. Brown*. 1 Pet. 352.

(*p*) *Craig v. Brown*. 1 Pet. 352.

no seal had been provided for the State, and from the impression of the seal it would seem, that it had belonged to the Court before the Territory was erected into a State, and there are reasons to believe that there is an inaccuracy of expression in the clerk, *query* whether it is sufficient.(q)

If the record be certified in the manner prescribed, such proof of the judgment, is of as high a nature as inspection of the record would be.(r)

The attestation "that the foregoing is *truly taken* from the records of the Court" is good, though it do not state that it was a full record, or an entire copy of any thing. But an attestation of a copy of docket entries truly taken, is not good, if no foundation is laid to shew its admissibility in the case.(s)

By declaring what faith and credit shall be given in one State to the judicial proceedings of another, Congress has declared the effect of the record.(t) And, it seems now settled, that the judgment of a State Court shall have the same credit, validity, and effect in any State, which it had in the State where it was pronounced; and that whatever pleas would be good in a suit thereon in such State, and no others, can be pleaded in any Court in the United States.(u) It was therefore held, that where the defendant had full notice, and gave bail, a judgment in a State Court is conclusive, and in a suit upon that judgment in the District of Columbia, the defendant could not plead *nil debet*.(x) So in a suit in the Circuit Court of South Carolina, upon a judgment in New York, it was

(q) *Craig v. Brown*. 1 Pet. 352.

(r) *Mills v. Duryee*. 7 Cranch, 481.

(s) *Ferguson v. Harwood*. 7 Cranch, 408.

(t) *Mills v. Duryee*. 7 Cranch, 481.

(u) *Ib.* *Hampton v. M'Connell*. 3 Wheat. 234.

(x) *Mills v. Duryee*. 7 Cranch, 481.

held, that the defendant could not plead *nil debet*.^(y) And such judgment, it seems, is to be considered in the Courts of the United States, as extinguishing the original cause of action in the same manner as in the Courts of the State where it is given: for where a suit was brought, in the Mayor's Court of New York, against two defendants, one of whom was not served with process, the other appeared, and pleaded, and judgment was rendered against them both, (under an act of assembly of that State,) such judgment was held conclusive against the one who appeared, in a suit in the Circuit Court of the Pennsylvania district, and that it amounted to a complete extinguishment of the original contract, so that if the latter were made at Teneriffe, the debt, after such judgment, is to be considered as arising at New York, and a discharge under the bankrupt law of Teneriffe, taking place after the judgment, does not bar the plaintiffs demand.^(z)

If the judgment in the State Court has been obtained against a person residing out of the State, who was never served with process, or notified of the existence of the suit, his remedy is the same and no other, as would be open to him if the suit had been brought on the judgment in the State Court where it was rendered. The Court in which the judgment was given would, upon motion, accompanied by sufficient proof, stay the execution and set aside the judgment. The attorney would be liable if he entered an appearance without authority, and so would the party if the attorney were not clearly able to answer in damages for the injury. If the judgment was entered by default for non-appearance on the return of the officer, he is liable for such return if false. But, if the record of

^(y) *Hampton v. McConnel*. 3 Wheat. 234. See also *Armstrong v. Carson's executors*. 2 Dall. 302. S. P.

^(z) *Green v. Sarmiento*. 1 Pet. 74. Cited in *Campbell v. Claudius*. Ib. 484, and in *Field v. Gibbs*. Ib. 155.

such judgment against two, set forth in the declaration, state that both the defendants appeared and pleaded, a plea to such declaration that the defendant was a resident of another State, and that no process was served upon him, nor had he notice or opportunity of defence, that he never appeared or consented to the proceedings, or authorised any one to appear for him, and therefore the judgment is void, is ill upon demurrer, inasmuch as the record imports absolute verity.(a)

As to the effect of a judgment recovered in a suit commenced by attachment, if the defendant had personal notice of the suit, and afterwards appeared and took defence, any objection to the proceeding is thereby waived, and *nil debet* cannot be pleaded.(b)

3. Office Books.

The whole of the record that relates to the subject matter must, it seems, be certified. For a mere extract from the book of the Surveyor General of Pennsylvania, of instructions to deputy surveyors, was held not to be evidence to shew, that a survey of a district was made by a wrong Surveyor.(c) Nor are office books evidence, to shew *ex parte* proceedings of the board of property in that State, to destroy the validity of a party's title.(d)

As to the certificate of an officer of the government of the United States, where, by act of Congress, the secretary of a Territory is required to furnish copies

(a) *Field v. Gibbs*. 1 Pet. 155.

(b) *Mayhew v. Thatcher*. 6 Wheat. 129. See *Mills v. Durvee*. 7 Cranch, 481. Opinion of JOHNSON J. *Phelps v. Holker*. 1 Dall. 261. *Kilburn v. Woodworth*. 5 Johns. 37. *Kibbe v. Kibbe*. Kirby, 110. *Betts v. Death*. Addison's Rep. 265, as to judgments on foreign attachment. As to the conclusiveness of a decree in Chancery, see *Hopkins v. Lee*. 6 Wheat. 100.

(c) *Griffith's lessee v. Evans*. 1 Pet. 166.

(d) *Ib.* See also *Brown's lessee v. Galloway*. *Ib.* 291.

of all the executive proceedings of the Governor of the Territory, to the President, every six months, a certificate from the Secretary of State of the United States, under seal of his office, that certain persons were appointed Justices of peace for a county in the Territory, as appeared by the official returns of the secretary of such Territory, "remaining in the office of this department," is sufficient evidence,^(e) though such certificate do not state, that such magistrates have taken the requisite oaths: for this will be presumed, if they are found acting as magistrates.^(f)

Constitution. Art. 4.—Citizens.

Art. 4. sect. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

It was contended in a case in Maryland, in the year 1797, that the laws of that State, authorising the proceeding by attachment against the property of persons not citizens of that State, to compel a payment of their debts, though liable to be dissolved by entering special bail, was a violation of this section: but the general Court, (CHASE and DUVAL J.) gave it as their opinion, that this section meant, that the citizens of all the States should have the peculiar advantage of acquiring and holding real as well as personal property, and that such property should be protected and secured by the laws of the State, in the same manner as the property of the citizens of the State is protected. It meant, that such property shall not be liable to any taxes or burdens, which the property of the citizens is not subject to. It may also mean, that, as creditors, they shall be on the same footing with the State creditor, in the payment of the debts of a deceased debtor.

(e) Ex parte Bollman and Swartwout. 4 Cranch, 114. 129.

(f) Ib.

Secures and protects personal rights. And they decided, that the law in question was not incompatible with the Constitution of the United States.(g)

By the resolution of Congress of the 2d March, 1821, providing for the admission of Missouri into the Union, it was declared to be on condition, that a particular clause in her Constitution should not be construed to authorise the passage of any law, and that no law should be passed in conformity thereto, by which any citizen of either of the States in the Union, should be excluded from the enjoyment of any of the privileges and immunities, to which such citizen was entitled, under the Constitution of the United States. This clause, (the 4th clause of the 26th section of the 3d article of the Constitution of Missouri,) directed the legislature of the State to pass laws, "to prevent free negroes and mulattoes from coming to and settling in the State."

It has been also held, that the above clause of the Constitution means only, that citizens of other States shall have *equal* rights with the citizens of a particular State, and not that they shall have different, or greater rights. Their persons and property must be in all respects, subject to the laws of such State. It does not therefore, affect the right of the Legislature of a State, to grant to individuals an exclusive privilege of navigating the waters of such State, by means of steam boats.(h)

Constitution. Art. 4.—Fugitives.

Art. 4. sect. 2. 3. No person, held to service or labour in one State under the laws thereof, escaping to another, shall, in consequence of any law or regulation therein, be discharged from such service or la-

(g) Campbell v. Morris. 3 Har. & M'Hen. 535.

(h) Livingston v. Van Inghen. 9 Johns. Rep. 507. See also on this subject, Murray v. M'Carty. 2 Munf. 393.

bour, but shall be delivered up on claim of the party to whom such service or labour may be due.

By the act of 12th February, 1793, sect. 3, when a person held to labour in any of the United States, or in either of the Territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States, or Territory, the person to whom such labour or service may be due, his agent, or attorney, is hereby empowered to seize or arrest such fugitive from labour, and to take him or her before any Judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made, and, upon proof, to the satisfaction of such Judge or magistrate, either by oral testimony, or affidavit, taken before, and certified by a magistrate of any such State or Territory, that the person so seized or arrested, doth, under the laws of the State or Territory from which he or she fled, owe service or labour to the person claiming him or her, it shall be the duty of such Judge or magistrate, to give a certificate thereof to such claimant, his agent, or attorney, which shall be sufficient warrant for removing the said fugitive from labour, to the State or Territory from which he or she fled. By sect. 4, any person, who shall knowingly and willingly obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labour, or shall rescue such fugitive from such claimant, his agent, or attorney, when so arrested, pursuant to the authority herein given or declared, or shall harbour or conceal such person, after notice that he or she was a fugitive from labour as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars: which penalty may be recovered by, and for the benefit of such claimant, by action of debt, in any Court proper

to try the same; saving, moreover, to the person claiming such labour or service, his right of action for, or on account of the said injuries, or either of them.

Under the foregoing provisions of the Constitution, and act of Congress, it has been decided in Pennsylvania, by the Supreme Court of that State, that if a female slave escape from Maryland into Pennsylvania, and, afterwards become pregnant in the latter State, and be there delivered of a bastard child, such child, under the above provisions, and the acts of assembly of the State of Pennsylvania, is born free: the Court declaring, that the Constitution and act of Congress embrace, in such case, only the person escaping, and not the issue.⁽ⁱ⁾

If a fugitive slave commit any public offence in another State, and be detained under the authority of the government of such State, the right of the master must yield to a paramount right.^(k)

So it has been held, by the Supreme Court of Pennsylvania, that this provision of the Constitution is not to be construed, so as to exempt slaves, escaping into another State, from the penal laws of the latter. If such slave be guilty of felony, or of riots, violent assaults and batteries, or other offences, which, though not felonious, are dangerous to the peace of the Commonwealth, they are subject to prosecution, and punishment. And where the slave had absconded from Maryland, and was committed to gaol in Pennsylvania, on a charge of fornication and bastardy, committed in the latter State, and an agent of the master came on to receive him, inasmuch as fornication is treated as a crime by the law of Pennsylvania, and, where it is accompanied with bastardy, security is required for

⁽ⁱ⁾ Commonwealth v. Holloway. 2 Serg. & Rawle, 306. 11 Niles's W. Reg. 28, (1816.) S. C. See ib. 46.

^(k) Glen v. Hodges. 9 Johns. 67. Supreme Court of New York.

the maintenance of the child, the Court remanded the slave to prison, to answer the charges of fornication and bastardy.^(l) But a fugitive slave cannot contract a debt in another State, so as to impair the right of the master to reclaim him. If, therefore, a person contract such debt with the fugitive slave in the State to which he fled, and, on the masters coming to reclaim him, sue out an attachment against such slave, for the debt, on which the slave is arrested by an officer, and forcibly detained and imprisoned, although the laws of such State prohibit slavery, trespass lies, in a Court of the State where the master resides, to recover damages for the injury.^(m)

From the whole scope and tenor of the Constitution and act of Congress it appears, that the fugitive is to be delivered up on a summary proceeding, without the delay of a formal trial in a Court of common law. If a certificate be given by a State Judge, agreeably to the act of Congress, after a hearing, such certificate is a legal warrant to remove the slave; and no writ of *homine replegiando* afterwards lies, on the part of the slave, in a Court of the State where such certificate is given, to try his right to freedom. Such writ is a violation of the Constitution. If the Slave, in such case, has a right to freedom, he may try it in the State to which he is removed. Where, therefore, a Judge of a State Court, after a hearing on *habeas corpus*, gave a certificate agreeably to the act of Congress, and the slave sued out of the Supreme Court a *homine replegiando*, against the keeper of the prison where he remained, the Court quashed the writ.⁽ⁿ⁾

Constitution. Art. 4.—Territories.

Art. 4. s. 3. 2. Congress shall have power to

(l) *Commonwealth v. Holloway*. 3 Serg. & Rawle, 4.

(m) *Glen v. Hodges*. 9 Johns. 67.

(n) *Wright alias Hall v. Deacon*. 5 Serg. & Rawle, 62.

dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed, as to prejudice any claims of the United States, or of any particular State.

This section is adapted to the Territorial rights of the United States beyond the limits or boundaries of any of the States, and to their chattel interests. It is not to be applied to a fortress within the limits of a State, which has never been ceded to the United States, though it has been occupied by them, with the tacit consent of the State, as a military post, for the purpose of defence and protection ;(*o*) or, though the title thereto be vested in the United States, by deed from the former proprietary of the soil of the State.(*p*)

The power of governing and of legislating for a Territory, is the inevitable consequence of the right to acquire and to hold Territory. Moreover, under this section, Congress possessed and exercised the absolute and undisputed power of governing and legislating for the Territories erected in Louisiana after its purchase. Congress gave them a legislative, an executive, and a judiciary, with such powers as it was their will, to assign to those departments, respectively. In assigning the judicial power in a Territory, Congress is not restrained by the limits prescribed in the third article of the Constitution. It has power to give a District Court of the United States, established in such Territory, jurisdiction over a case brought by or against a citizen of the Territory, though he be not a citizen of a State. Its jurisdiction depends entirely on the will of Congress, as expressed in their laws. And it was accordingly held, by the Supreme Court, that when Congress passed the act of the 2d March,

(*o*) *The People v. Godfrey*. 17. Johns. 225.

(*p*) *Commonwealth v. Young*. 1 Hall's Journ. of Jurisprudence, 47. Supreme Court of Pennsylvania, Sept. T. 1818.

1804, vesting in the District Court of Orleans Territory, the same jurisdiction and powers, which were by law given to, or might be exercised by, the Judge of Kentucky district, they intended that the citizens of the Territory of Orleans, might sue or be sued in that Court, though not citizens of a State, and, therefore, that Court had jurisdiction, though the suit was against a citizen of the Territory.^(q) But, it seems, the restrictions in the acts of Congress, as to who may sue in a Circuit Court, or a District Court acting as such, and as to suits by assignees, were applicable to such suits.^(r)

^(q) *Séré v. Pitot*. 6 Cranch, 332.

^(r) *Ib.* See *ante*, 103. 116. Act of September 24th, 1789, sect. 11.

CHAPTER XXXIII.

Constitution. Article VI.

CONSTITUTION. ART. VI.—SUPREME LAW.

ART. 6. s. 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

This declaration marks the characteristic distinction between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects.(a)

An act of Congress, contrary to the Constitution of the United States, is null and void. The Constitution is a superior and paramount law, which cannot be altered by the Legislature; and Courts of justice, when called on to decide a case in which the Constitution and law are opposed, are bound to enforce the Constitution as paramount, and to declare the law void, or modify it according to the Constitution, if the case admit it. The question, whether an act of Congress was constitutional, has been discussed in the Supreme Court, in a variety of cases,(b) and in *Marbury v.*

(a) *Cohens v. Virginia.* 6 Wheat. 381.

(b) *Hylton v. The United States.* 3 Dall. 171. *Marbury v. Madison.* 1 Cranch, 137. *Martin v. Hunter's lessee.* 1 Wheat. 304.

Madison,(c) the judicial act of September 24th, 1789, so far as it authorised the Supreme Court to issue a mandamus to an officer of the United States, was declared to be the grant of an original jurisdiction, in a case not warranted by the Constitution, and, therefore, void. So, where an act of Congress, passed on the 23d March, 1792, entitled, an act to provide for the settlement of the claims of widows and orphans, barred by the limitations heretofore established, &c. imposed on the Judges of the Circuit Courts, and of the District Courts, where no Circuit Court was holden, the duty of determining the arrears of pension that ought to be paid to disabled non-commissioned officers, soldiers, and seamen, residing in their districts, and, for that purpose, required them to examine the case, in the manner prescribed, to ascertain the degree of disability, and certify the result, and their opinions, to the Secretary of war, reserving to the Secretary a power to withhold the name of such person, and report the same to Congress, if he suspected imposition or mistake, and, for these purposes, prolonged their session five days, the Judges of the Circuit Courts declined executing the act, (most of them altogether, JAY C. J. CUSHING J. and DUANE D. J., agreeing to proceed as commissioners,) on the ground that the act of Congress was an unconstitutional requisition of duties not properly appertaining to the judicial department, and subjected their decisions to the revision of an executive officer, and was therefore void. The act was, shortly afterwards repealed.(d) So, the language of

Loughborough v. Blake. 5 Wheat. 317. Cohens v. Virginia. 6 Wheat. 264. United States v. Smith. 5 Wheat. 158. M'Culloch v. Maryland. 4 Wheat. 316, and others.

(c) 1 Cranch, 173, *ante*, 13. 18.

(d) Note to Hayburn's case. 2 Dall. 410. The act of 28th February, 1793, transferred the duties, in a different shape, to the district Judges, or commissioners appointed by them. See *ante*, 71. 363.

the 25th section of the act of September 24th, 1789, giving a writ of error from the Supreme Court of the United States to the highest State Courts, in cases where is drawn in question the validity of a treaty, &c, was restrained by the Court so as to conform to the Constitution, which confines the judicial power to *cases arising under* treaties, &c.(e) And the words of the 11th section of the act of September 24th, 1789, giving the Circuit Courts cognisance of all suits of a civil nature where an alien is party, were held to be confined to controversies between a State, or a citizen of a State, and aliens, agreeably to the terms of the Constitution.(f)

In like manner, if the law of a State be repugnant to, or incompatible with the Constitution of the United States, or laws made in pursuance thereof, or treaties, it is void : and the validity of the State laws in these respects has been inquired into, and decided upon, in a variety of cases.(g) It seems, however, that this power of declaring an act of Congress or a law unconstitutional, will be exercised only in a clear case.(h)

A law passed in pursuance of the power of exercising exclusive legislation over the district that became the seat of government, (the District of Colum-

(e) Art. 3. s. 2. 1. *Owings v. Norwood.* 5 Cranch, 344. *ante*, 57.

(f) *Mossman v. Higginson.* 4 Dall. 11. *Hodgson v. Bowerbank.* 5 Cranch, 303. *Ante*, 114.

(g) *Georgia v. Brailsford.* 3 Dall. 1. *Ware v. Hylton.* 3 Dall. 199. *Calder v. Bull.* 3 Dall. 386. *Cooper v. Telfair.* 4 Dall. 14. *Fletcher v. Peck.* 6 Cranch, 135. *New Jersey v. Wilson.* 7 Cranch, 164. *Terrett v. Taylor.* 9 Cranch, 52. *Town of Pawlet v. Clark.* 9 Cranch, 335. *M'Culloch v. Maryland.* 4 Wheat. 316. *Dartmouth College v. Woodward.* 4 Wheat. 518. *Sturges v. Crowninshield.* 4 Wheat. 122. *M'Millan v. M'Neil.* 4 Wheat. 209. *Farmers and Mechanics Bank v. Smith.* 6 Wheat. 131. *United States v. Brigantine William.* 4 Hall's Law Journ. 255. *Ante*, 353.

(h) See the cases above cited, and *ante*, 353.

bia,) is within this clause; as fully as any other law passed by Congress; and a law of a State, made to defeat the objects it has in view, is void. But such law will be confined to the local limits of the district, if that appears to have been the intention of Congress, in passing it; especially, if it go to defeat the penal laws of a State.⁽ⁱ⁾

A law passed by a State, laying a tax which is to operate solely on a bank chartered by Congress, located in the territory of such State, is unconstitutional and void. It is incompatible with the clause, declaring the laws of the United States to be the supreme law of the land, and with the exercise of the constitutional powers of the United States; since, if a State might tax such bank, it might tax every other object of property existing under, and necessary to the due execution of the laws of the United States, such as the mint, the mail, patent rights, custom house papers, and judicial process, and all the means employed by the government, to an extent which would defeat the ends of the government. A State can tax only the people and property of such State, and objects brought within its jurisdiction, but not objects within it introduced by virtue of an act of Congress, constitutionally made; for these are protected by a paramount authority, which the State is restrained from impugning. In these objects are involved the common interests of the people of the Union, who are not represented in, and have no controul over, the State authority; but are protected, in each State, in the fair enjoyment of these objects, by a sanction which the people of every State have agreed to, and are bound by. Such tax, is a tax on the instrument employed by the government of the Union to carry its powers into execution. But a State may, by law, tax the real property of such bank, in com-

(i) Cohens v. Virginia. 6 Wheat. 264.

mon with other real property within the State; or the interest held by the citizens of such State, in common with the property of the same description throughout the State.(k)

It may be seen, by the cases formerly referred to,(l) that the State Courts have exercised the right of declaring acts of Congress, to be contrary to the Constitution of the United States, and so far void. Such decisions, it would seem, are, in most instances, liable to revision by writ of error in the Supreme Court of the United States, as being cases arising under the Constitution and laws of the United States; and thus, if circumstances require it, a uniformity of decision may generally be secured, in questions of this description.(m)

On the same principle it would seem, it was held, by the Supreme Court of Pennsylvania, that it has power to decide on the validity of an act of assembly of another State, in reference to the Constitution of the United States, when the question arises in a suit before them, and becomes essential to its decision. Such decision can have no effect on the validity of the act of assembly, within the jurisdiction of the other State. It only affects the cause in which it arises, and no regard would be paid to it in such other State, except so far as it affects that cause.(n)

As a treaty is declared to be the Supreme law of the land, it is obligatory on Courts; and where it affects the rights of parties litigating in Court, it is as much to be regarded as an act of Congress. If, therefore, after a decree regularly condemning a prize, a treaty is

(k) *McCulloch v. Maryland*. 4 Wheat. 316.

(l) See jurisdiction of State Courts and magistrates, *ante*, 272. *Martin v. Hunter's lessee*. 1 Wheat. 304.

(m) A decision on a *habeas corpus* seems to be an exception, as the law now stands. See *ante*, 62. See also *ante*, Ch. 26.

(n) *Stoddart v. Smith*. 5 Binn. 355.

made, directing the restoration of vessels so circumstanced, the appellate Court is bound to decree its restoration.(o)

In respect to criminal proceedings, we have before referred to the case of Isaac Williams, an American citizen, who was charged in the Circuit Court of Connecticut, in the year 1799, on two indictments, for accepting, at Guadaloupe, in February, 1797, a commission to cruize against British vessels, contrary to the 21st article of the treaty of 1794, with Great Britain; and also, for capturing a British vessel on the 23d September, 1797, contrary to the same article, and was convicted and sentenced to fine and imprisonment on both indictments.(p) But, in a late case, it is intimated, that it is doubtful, whether a treaty is to be considered as of the same character as an act of Congress, in respect to criminal offences.(q)

This clause of the Constitution, operates as well in respect to treaties made under the former confederation, before the adoption of the Constitution, as to treaties concluded afterwards, and annuls any act of assembly passed by a State which is incompatible with them. Where, therefore, the fourth article of the definitive treaty of peace with Great Britain, concluded in September, 1793, provided, that creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts theretofore contracted, and an act of assembly of the State of Virginia had, in 1777, autho-

(o) *United States v. The Peggy*. 1 Cranch, 103. *Ante*, 53. See *Ware v. Hylton*. 3 Dall. 244. 261. 1 Dall. 232. Act of September 24th, 1789, sect. 34.

(p) 4 Hall's Law Journ. 461. 2 Cranch, 82. *Ante*, 263, 306. The act of 14th June, 1797, (now repealed,) provided for cases of this nature. The present act, 20th April, 1818, sect. 4, is confined to cruizing against citizens of the United States, or their property. *Ante*.

(q) *The Bello Corunnes*. 6 Wheat. 171. *Ante*, 328.

risied a payment by any citizen of that State, owing money to a subject of Great Britain, to the commissioner of the loan office of that State, whose receipt should discharge him; it was held, that notwithstanding such payment by a debtor, he was liable, after the peace, to the English creditor.(*r*)

In some instances the President, as that branch of the government in which the executive power is vested by the Constitution, and as enjoined to take care that the laws should be faithfully executed, has exercised the power of declaring the State of the nation under existing treaties, and of enforcing and carrying into effect the obligations of neutrality. Thus in April, 1793, President WASHINGTON, with the unanimous advice of the heads of departments, issued a proclamation of the neutrality of the United States, in the war then existing between France and the allied powers.(*s*)

The case of the Ship William, which occurred in the same year has been already mentioned.(*t*) Other cases afterwards arising of similar captures within the jurisdictional limits of the United States, by French cruizers, which, it was considered, the American government was bound to redress, in virtue of the treaty of peace with Great Britain,(*u*) it was arranged, that such vessels should be detained under the orders of the French ambassador, or consuls, until the government of the United States should be able to inquire into the facts,(*x*) and, after stating the evidence, the President sent it to the French ambassador, with a request of restoration, unless he had contradictory evidence, which he was requested to furnish.(*y*) The

(*r*) Ware v. Hylton. 3 Dall. 199.

(*s*) Marsh. Life of Washington, 404.

(*t*) Ante, 216.

(*u*) Wait's State Papers, 93.

(*x*) Ib. 114. 165.

(*y*) Ib. 115. 119.

President subsequently declared, that he considered the United States bound to effectuate the restoration of, or to make compensation for prizes made of any of the parties at war with France, subsequent to a certain date, by privateers fitted out of our ports.^(z) Instructions were afterwards given by the President, to the Governors of the different States, to use all the means in their power, for restoring prizes taken by vessels illegally fitted out in this country, found within their ports, and the aid of the custom house officers was given to them.^(a) So, in relation to captures within the jurisdiction of the United States, the Governors were empowered to proceed in the first instance ; they were to notify the district attorney, and the attorney to notify the agents of the parties, and consuls, and recommend arbiters to be chosen by mutual consent, to decide, whether the capture were made within the jurisdiction of the United States ; according to which, the Governor might proceed, and deliver the vessel to the one party, or the other. If no agreement took place, depositions were to be taken, and transmitted to the President, for the information and decision of the President.^(b) In the case of three of the vessels captured, the President demanded, of the French ambassador, that they should be given up, according to the determination of the President, but this demand was refused.^(c) It was, at the same time, repeatedly declared, in the communications of the Secretary of State, (Mr. Jefferson,) that no power in this country, could take a vessel out of the power of the Courts, and that it was only because they decided not to take cognisance of the case, that it resulted to the

(z) Wait's State Papers, 136. 124.

(a) Ib. 166.

(b) Ib. 196.

(c) Ib. 200.

executive to interfere in it.^(d) After the passage of the act of 5th June, 1794, this practice it appears fell into disuse, as that act established the jurisdiction of the Courts.^(e)

By the treaty of 1794, with Great Britain, art. 27, it was agreed, to deliver up to justice, all persons who, being charged with murder or forgery, committed within the jurisdiction of either, should seek an asylum within the countries of the other: provided, that this should only be done on such evidence of criminality, as according to the laws of the place where such fugitive or person so charged should be found, would justify his apprehension and commitment for trial, if the offence had been there committed. In the year 1797, Jonathan Robbins was committed to gaol in Charleston, South Carolina, on suspicion, grounded on two affidavits, of having been concerned in a mutiny on board the British frigate *Hermione*, in the year 1794, which ended in the murder of the principal officers, and carrying the frigate into a Spanish port; and the case being brought before BEE, district Judge of the district of South Carolina, by *habeas corpus*, the prisoner was, on motion in behalf of the British consul, delivered over by the Judge to an officer of a British armed vessel and carried to Jamaica. The district Judge held, that a treaty was the Supreme law of the land, and that the 3d article of the Constitution, extended the judicial power to cases arising under treaties, though there was no act of Congress vesting such jurisdiction.^(f) When, however, this case, which

(d) Wait's State Papers, 115. 168. See the 7th article of the treaty of 1794, with Great Britain, which provided for payment by the United States, for certain of these cases.

(e) Wait's State Papers, 333. 347. See *ante*, 217.

(f) Case of Jonathan Robbins. 1 Hall's Journ. of Jurisprudence, 25. See it stated, *ib.* 27, by Judge BEE, that the judiciary had, in two instances, in South Carolina, where no provision was expressly stipulated, (by act of Congress,) granted injunctions to suspend

attracted much public attention, was discussed in Congress, it was defended as a case proper for executive, and not for judicial determination. It was contended that President ADAMS, who on the application of the British ambassador, had directed the Secretary of State to write to Judge BEE, communicating the President's advice and request, that the seamen might be delivered up to the consul or agent of Great Britain, if such evidence of the fact were adduced as was required by the treaty, had the power to decide the question, whether the person charged should be delivered up under the treaty.(g)

If a treaty stipulate for the restoration of property captured during the war, and not yet definitively con-

the sale of prizes, by virtue of existing treaties, and that if it were otherwise there would be a failure of justice. One of the cases here referred to, is probably that of *The Consul of Spain v. The Consul of Great Britain*, (Bee's Adm. Rep. 263,) where the Circuit Court of South Carolina, on a bill filed, granted an injunction to stop the sale of a Spanish prize, taken on the high seas by a British frigate, and brought into Charleston, the Chief Justice holding, that as there was no treaty that authorised the sale, nor any permission of the government shewn, an attempt to sell was inconsistent with the sovereignty of the United States. The injunction was granted, till further order of the Court, unless permission should be sooner obtained from the President of the United States. See another case in 1796, (*Moodie v. Ship Amity*, ib. 89,) where the District Court refused an injunction, to stop the sale of a British vessel captured by a French armed vessel, holding, that the treaty with France excluded all jurisdiction in such cases.

See the principles now settled as to the jurisdiction of the Courts of the United States, *ante*, 18. 25. 69. 104. 128. 129. 345. 356. The act of 13th February, 1801, sect. 11, (now repealed,) gave the Circuit Court cognisance of all cases in law and equity, arising under the Constitution and laws of the United States, *and treaties made, or which should be made, under their authority*.

(g) Speech of C. J. MARSHALL, when a member of the House of Representatives of the United States. 5 Wheat. Append. 4 Wait's State Papers, 302. See also Bee's Admiralty Reports, 266, where the order for the delivery of Robbins purports to be "in consideration of the circumstances, and at the particular request of the President of the United States." Mr. MARSHALL's Speech is also published there.

demned, it seems, restoration is an executive act, when viewed as a substantive act, independent of and unconnected with other circumstances, though Courts are also to regard the treaty as the Supreme law, on the question of affirming or reversing such condemnation.^(h)

In the year 1796, after the treaty with Great Britain was ratified by the President and Senate, and was proclaimed by the President; it became a question, how far, under the Constitution, a treaty was binding on Congress as a legislative body. In the discussion of this question in the House of Representatives, it was contended on the one hand, that a treaty was a contract between the two nations, which, when made by the President, by and with the advice and consent of the Senate, was binding on the nation, and that a refusal by the House of Representatives to carry it into effect, was breaking the treaty, and violating the faith of the nation. On the other hand, it was contended, that a treaty which required an appropriation of money, or any act of Congress, to carry it into effect, was not, in that respect, obligatory, till Congress had agreed to carry it into effect, and they were at full liberty to make or withhold such appropriation or act, without being chargeable with violating the treaty, or breaking the faith of the nation. Accordingly, the House of Representatives passed a resolution, calling on President WASHINGTON, to lay before them the instructions to the minister, (Mr. Jay,) who had negotiated the treaty with Great Britain, and the correspondence and documents, except so far as, on account of the pending negotiation, they were improper to disclose. The President declined a compliance with the request; stating, among other reasons, that a treaty,

^(h) United States v. Schooner Peggy. 1 Cranch, 109. See Ware v. Hylton. 3 Dall. 279. *Ante*, 348.

duly made by the President and Senate, became the law of the land, and was obligatory; that the assent of the House of Representatives was not necessary to the validity of a treaty, and, therefore, the papers requested could not come under the cognisance of the House of Representatives, except for the purpose of impeachment, which was not stated to be their object. The House of Representatives, thereupon, passed resolutions, disclaiming the power to interfere in making treaties, but asserting their right, whenever stipulations were made on subjects committed to Congress by the Constitution, to deliberate on the expediency of carrying them into effect: and in legislating on several treaties then before them, they struck out the words, "that provision ought to be made by law," and substituted words which declared merely the *expediency* of passing the necessary laws.⁽ⁱ⁾

In the session of 1815--16, the question as to the effect of a treaty, arose again in Congress, and was elaborately discussed in both branches. A commercial treaty had been made at London, in the month of July preceding, between the United States and Great Britain, by which it was agreed to abolish the discriminating duties on British vessels and cargoes, then existing under the acts of Congress, and a bill was passed in the House of Representatives, particularly enacting the same stipulations as the treaty contained. But it was rejected in Senate, that body having passed a bill of their own, which simply *declared*, that so much of any act of Congress as was contrary to the treaty, should be deemed and taken to be of no force or effect. This bill was amended in the House, by striking out the words, "and declared," and substituting the original bill, which the Senate had rejected: these amendments were, however, rejected in the Senate, and the

(i) 5 Marsh. Life of Wash. 651. 660. 664.

difference between the two houses terminated in the appointment of committees of conference, by whose recommendation the above mentioned amendments of the House were relinquished, and the bill passed as proposed by the Senate in a declaratory shape, with some modifications, not affecting the principles in dispute.

It belongs exclusively to the government, to recognise new States that arise in the revolutions of the world. Until such recognition, either by our own government, or that to which the new State belonged, Courts of justice are bound to consider the ancient state of things as remaining unaltered. The rival chiefs in the island of St. Domingo were, therefore, not considered foreign princes or States, within the act of 5th June, 1794, prohibiting the fitting out any ship for the service of one foreign State or prince, to cruize against another.(k)

A treaty need not be stated in pleading: for it is the supreme law of the land of which all Courts must take notice.(l)

It seems, the authority to declare a treaty to have been violated, and to be therefore void, belongs only to Congress; the judiciary cannot exercise it.(m) Whether the judiciary have power to declare an article of a treaty to be unconstitutional, and therefore void, *query*.(n)

A construction of the Constitution in relation to a different department of the government, has been

(k) *Gelston v. Hoyt*. 3 Wheat. 324. See *United States v. Palmer*. 3 Wheat. 630. *Ante*, 525.

(l) *Martin v. Hunter's lessee*. 1 Wheat. 360.

(m) *Ware v. Hylton*. 3 Dall. 361. IREDELL J.

(n) *Ib.* 237. CHASE J. See the case of Jonathan Robbins. 1 Hall's Journ. of Jurisprudence, 13, where it was contended that the 27th article of the treaty of 1794, with Great Britain was unconstitutional; and *United States v. Schooner Peggy*. 1 Cranch, 109.

given by the legislative department, in the passage of an act of Congress. Thus, in the first Congress, when the bill for establishing the department of secretary of foreign affairs, (which, by a subsequent act, was made that of the Secretary of State,) was pending in the House of Representatives, the question arose, by whom such officer should be removable. The bill contained a clause, making him expressly removable by the President, and was agreed to in committee in that shape : but, lest the power of removal might, thereafter, appear to be exercised by virtue of a legislative grant only, and in order to shew the opinion of the House, that it was by fair construction, fixed in the President, by the Constitution, this clause was afterwards, struck out, and in the second section it was provided, that there should be in the said department an inferior officer to be called chief clerk, "who, whenever the said principal officer shall *be removed from office by the President of the United States*, or in any other vacancy," shall have charge of papers, &c.(o) The bill was thus passed into a law, after an animated discussion, thereby clearly implying the power of removal to be solely in the President, and this construction, on an important point, has ever since prevailed.(p)

(o) Act of July 27, 1789, sect. 2.

(p) 5 Marsh. Life of Washington, 199, 200. Debates of the first session of Congress, 1789. See *ante*, 359. The same language was used in the second section of the act of the 7th August, 1789, for establishing the Department of War. See, also, the 7th section of the act to establish a Treasury Department, the 2d September, 1789.

CHAPTER XXXIV.

Constitution. Article V.

CONSTITUTION. ART. V.—MAKING AMENDMENTS.

ART. 5. Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress. *Provided*, that no amendment, which may be made prior to the year 1808, shall, in any manner, affect the first and fourth clauses in the 9th section of the first article; and, that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

It is not necessary that an amendment to the Constitution, proposed in Congress, and adopted by two-thirds of both Houses, should be submitted to the President for his approbation.(a)

(a) *Hollingsworth v. Virginia.* 3 Dall. 378.

CHAPTER XXXV.

Constitution.—Amendments.

CONSTITUTION. AMENDMENTS.—ART. II.

ART. 2. The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State.

The Supreme Court having decided, that assumpsit might be maintained against a State by a citizen of another State, *(a)* the State of Massachusetts, being sued among others, proposed this amendment to the Constitution, and it was duly ratified. *(b)* It has been assigned as the reason of its adoption, that all the States, when the Constitution was adopted, were greatly indebted, and an apprehension was extensively entertained, that suits would be brought for these debts in the Courts of the United States, and that the States would not be left to adjust them, or other claims against them. *(c)*

A suit between individuals, where a State is not necessarily a defendant, and has had neither possession of, nor property in the money sued for, is not within this amendment, although a State suggest a

(a) *Ante*, 15.

(b) 1 Tucker's Black. 153.

(c) *Cohens v. Virginia*, 6 Wheat. 406.

title in itself to the sum demanded. As where the suit was brought by certain individuals against others in the District Court of the district of Pennsylvania, as a Court of Admiralty, to recover money which the former Court of Appeals, under the confederation, had decreed to belong to the plaintiffs, but which a State claimed, and in opposition to the decree of the Court of Appeals, the marshal of the State Court of Admiralty had paid the money to the Judge of that Court, who delivered it to the defendant's testator, then Treasurer of the State, who received it for the use of the State, but gave a bond of indemnity to the Judge, invested the money in certificates, and annexed a memorandum thereto, that the certificates would be the property of the State, when the State released him from the bond of indemnity, which certificates he afterwards funded in stock of the United States. The property remained in his possession after he ceased to be Treasurer, and in that of his executors, until after the institution of the suit, when the State, by act of assembly compelled a payment to them by the executors, undertaking to indemnify them, and to defend them against process to recover the money. It was determined, that the property was held by the testator as an individual, and not as Treasurer, and never belonged to the State, nor was in its possession, and the suit not being against the State, the Court had jurisdiction.(d)

The Legislature of the State of Ohio, on the 8th February, 1819, passed an act, to levy and collect a tax upon each office of discount and deposit established by the bank of the United States within that State, namely, one at Cincinnati, and the other at Chillicothe. One of the defendants, Osborn, the auditor of the State, in conformity with the provisions of the act, (notwithstanding an injunction from the Circuit Court of the

(d) *United States v. Peters.* 5 Cranch, 115. See also *ante*, 15.

United States, previously served upon him,) in September, 1819, issued his warrant to the other defendant, Harper, who entered the banking house at Chillicothe, and forcibly took therefrom 100,000 dollars. On a motion to the Circuit Court, for a rule to shew cause, why an attachment should not issue against the defendants, for a contempt, in disregarding the injunction, it was objected, that the proceedings were against the auditor of the State of Ohio, and were in effect suing the State; that they went to controul the collection of State revenue; prohibit the State officers from executing the laws of the State; and that, under the above article of the amendments, the Court had no jurisdiction; but the Court decided, that a suit against a State officer is not necessarily a suit against a State: and though he acts by virtue of a law of the State, yet if that law be unconstitutional it is a nullity, and he is individually responsible; that if a State passes a void law, an officer acting under it may be enjoined, and the law taxing the branch bank being unconstitutional, according to the decision of the Supreme Court of the United States in the case of *M'Culloch v. the State of Maryland*,^(e) the Court had jurisdiction; and the rule was made absolute.^(f)

A writ of error from the Supreme Court of the United States to a State Court, to remove a judgment in which a State is plaintiff, for the purpose of re-examining the question raised below, whether that judgment is in violation of the Constitution or laws of the United States, is not a suit commenced or prosecuted, within the meaning of this amendment, and will be sustained. Whether a writ of error in such case, the effect of which would be to restore the party to the

^(e) 4 Wheat. 316. *ante*, 394.

^(f) *Bank of the United States v. Osborn and Harper*. Nat. Intel. October 7, 1820, and Niles's Reg. It appears a similar decision was had in Kentucky.

possession of a thing which he demands, would be within the amendment, is not decided.*(g)* Nor is a writ of error within this amendment, which is sued out from the Supreme Court to bring up a judgment in a State Court, rendered in favour of a State against one of its own citizens: for the prohibition against commencing or prosecuting a suit against a State, is limited to one commenced or prosecuted "by a citizen of another State, or by a citizen or subject of a foreign State."*(h)* As the amendment does not comprehend controversies between two or more States, or between a State and a foreign State, the jurisdiction of the Court still extends to these cases.*(i)* It is also said, that this amendment is confined strictly to suits at law, or in equity, and does not comprehend suits of admiralty and maritime jurisdiction.*(k)*

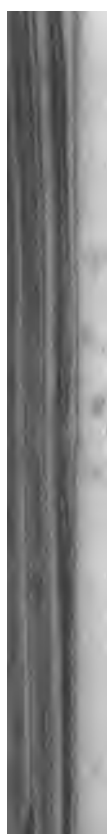
(g) Cohens v. Virginia. 6 Wheat. 412.

(h) Ib. 412.

(i) Ib. 406.

(k) United States v. Bright and others. 3 Hall's Law Journ. 225. WASHINGTON J.

THE END.



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ERRATA.

Page 21, line 3, note, For "*Court*," read "*Circuit*."

94, line 10. Before "*New York*," insert "*Southern District of*."

24, line 11, and page 95, line 4, from bottom, for "*Justices*," read "*Justice*."

103, note (c) line 3. Before "*Court*," insert "*Circuit*."

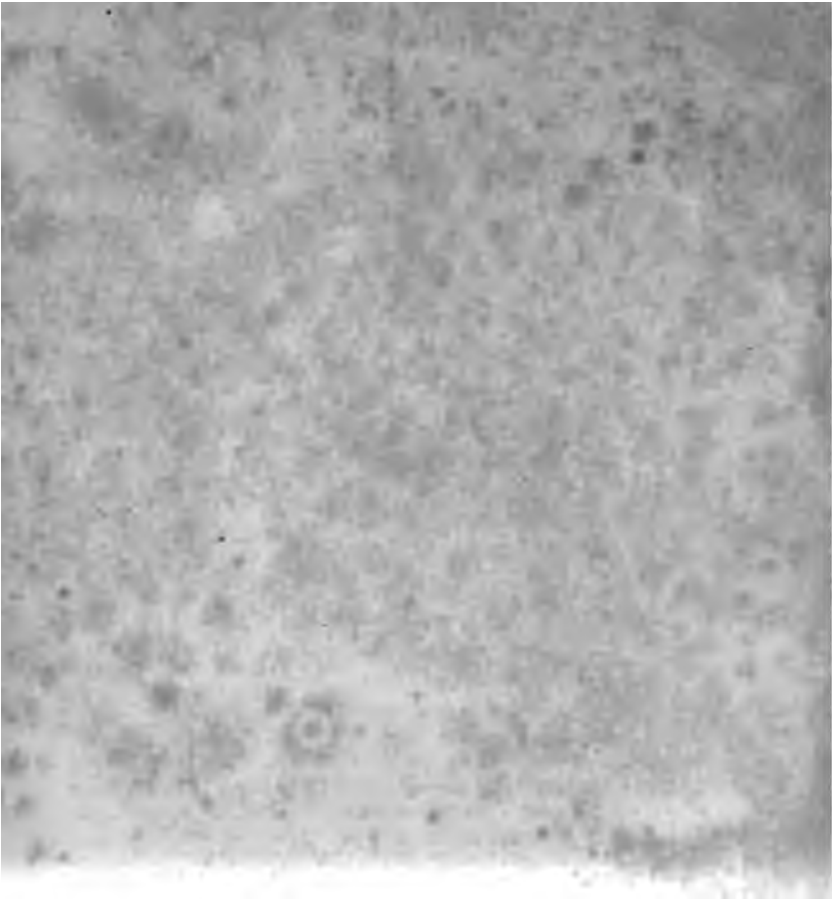
145, line 15. After "*Constitution*," insert "*treaties*."

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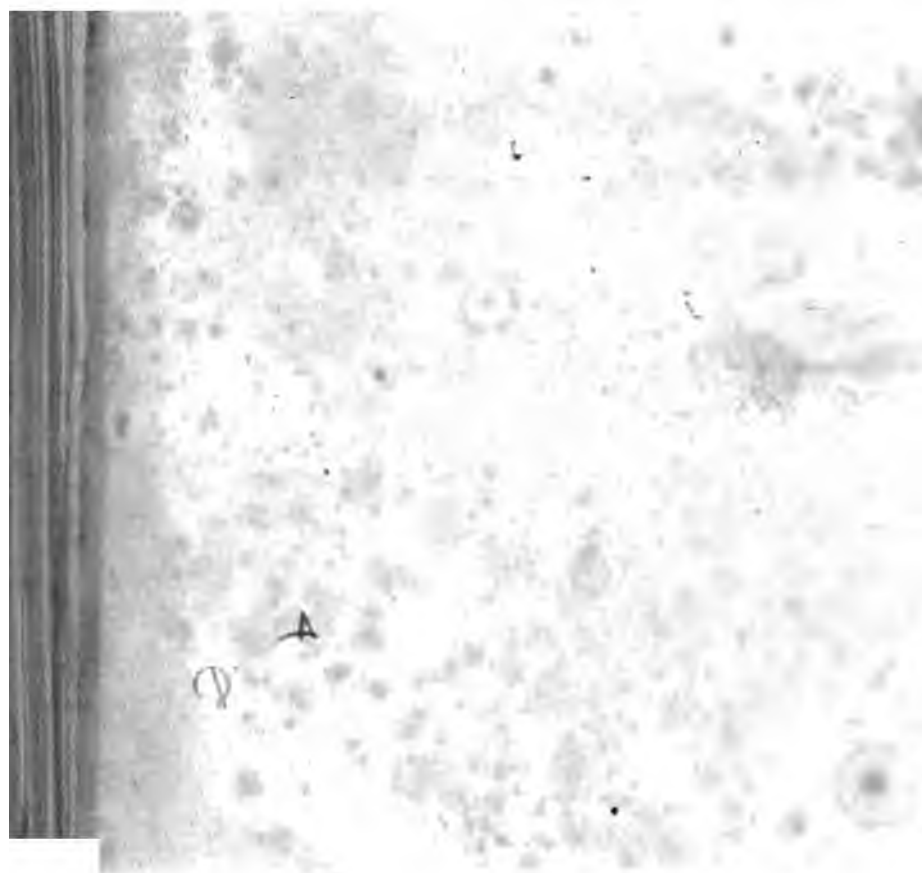
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344, line 14. Strike out "*other*."











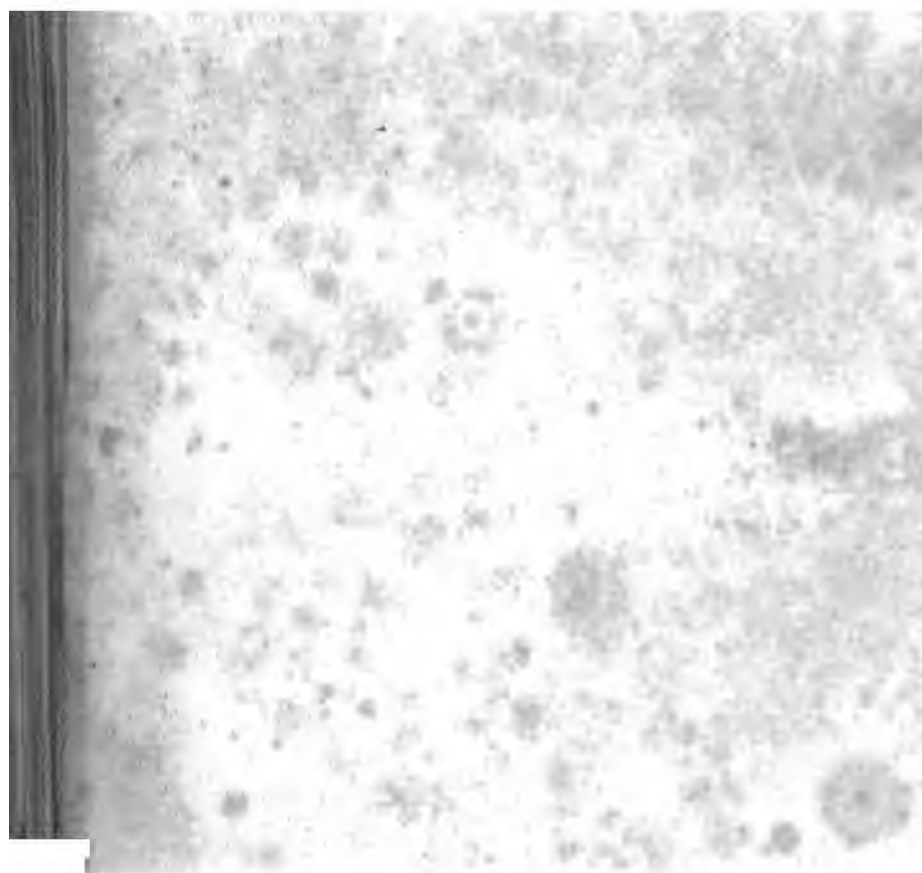




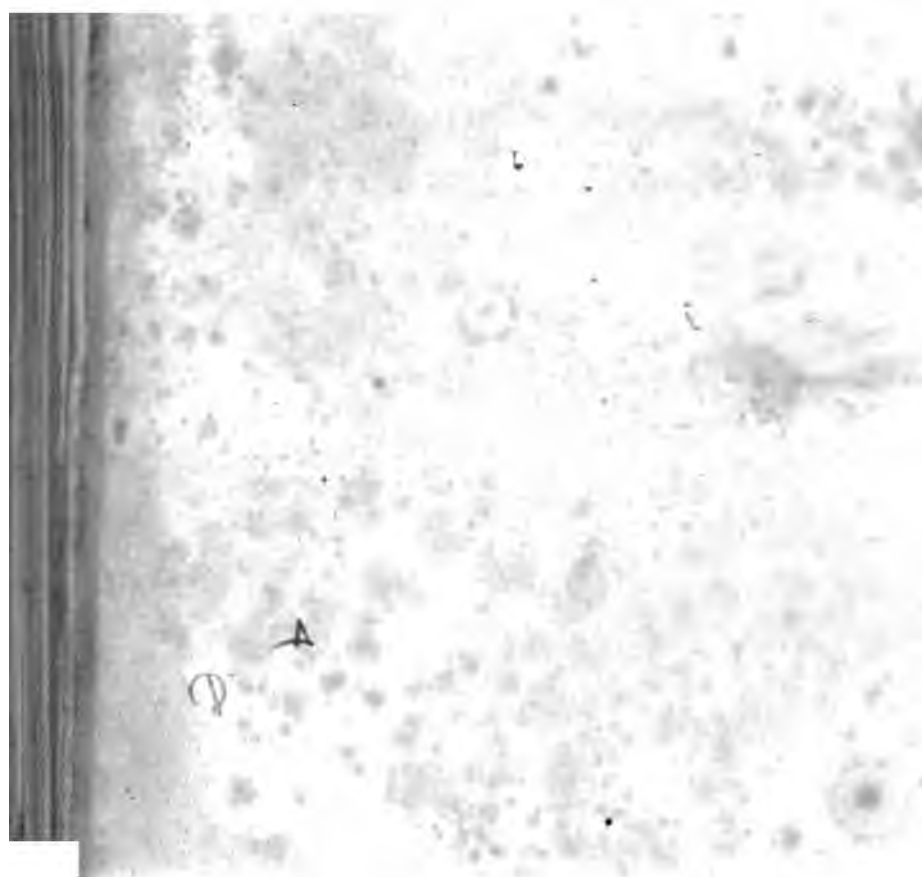
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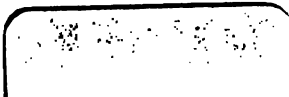
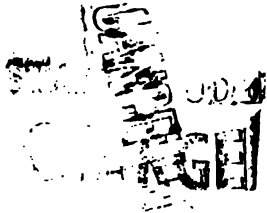
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